Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that a prisoner alleging ineffective assistance of counsel under the Sixth Amendment must overcome the strong presumption that his trial counsel's conduct, including conduct relating to investigations, "might be considered sound trial strategy[]" and that counsel's conduct must be evaluated from counsel's perspective at the time without the temptation to second-guess or the "distorting effects of hindsight[.]" In *Burger v. Kemp*, 483 U.S. 776 (1987), this Court held that there was a "reasonable basis" for trial counsel's strategic decision not to call the defendant's mother as a witness since he concluded her testimony would be unhelpful and potentially counterproductive. Trial counsel in the instant capital case did not present evidence of the family abuse experienced by the defendant's mother and the defendant as mitigating evidence because "he did not know what [the mother] would say[,]" "she had denied the abuse[,]" she had twice lied to the police about the defendant, neither defendant nor the mother were forthcoming about her "prior life[,]" and he did not want to open the door to damaging background information that the mother knew about Karis. The Ninth Circuit Court of Appeals held that counsel's decision was not a reasonable strategic decision and vacated the penalty phase for ineffective assistance of counsel. The questions presented are:

1. Whether the Ninth Circuit's reversal of a penalty phase for ineffective assistance of counsel conflicts with *Strickland v. Washington* and *Burger v. Kemp*, since trial counsel opted not to investigate further, or introduce in mitigation, evidence that the defendant and the defendant's mother had been abused, for the strategic reason that the mother had denied the abuse, had lied to the police, neither the defendant nor his mother wanted counsel to pursue the mother's

"prior life[,]" and counsel did not want to open the door to damaging background information that the mother knew about Karis.

2. Whether the Ninth Circuit is engaging in a mode of analysis of ineffective assistance of counsel which conflicts with *Strickland v. Washington* and *Burger v. Kemp* by utilizing "hindsight" and second-guessing to reject trial counsel's articulated tactical reasons for choosing to conduct a "less than complete" investigation when, under the circumstances at the time of trial, those express reasons are sufficient to support the strong, deferential presumption that trial counsel's conduct "***might*** be considered sound trial strategy[.]" (Emphasis added.)

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin (hereafter the State), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals, Appendix ("App.") A, is reported at *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002). The orders denying rehearing and denying rehearing en banc are unreported. App. D, E.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief as to the penalty phase of this capital case was entered on March 18, 2002. The parties' petitions for rehearing and suggestions for rehearing en banc were denied May 2, 2002. On July 21, 2002, Justice O'Connor extended the State's time

to file a certiorari petition to and including August 30, 2002. On July 23, 2002, Justice O'Connor extended Petitioner Karis's time to file a certiorari petition to and including August 30, 2002.[1] On August 20, 2002, Justice O'Connor extended the State's time to file a certiorari petition to and including September 13, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF CASE

In 1981, Karis abducted two women, Ms. P and Ms. V, at gunpoint in broad daylight from a California street. He drove them to a remote area, ordered them to disrobe, raped Ms. V, and shot them both down from behind. Ms. P died, but Ms. V survived. Karis was convicted of murdering Ms. P, attempting to murder Ms. V, raping Ms. V, and kidnapping both women. The jury found true the special circumstances that Karis murdered Ms. P while engaged in the commission of a kidnapping and in the immediate flight from a rape.

Prior to the penalty phase, Karis's counsel investigated the possibility of presenting evidence that Karis and his mother had been abused. App. A at 57, 58-59, 60-61 (Kleinfeld, J.,

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1. Hereafter Karis (who is the Respondent with respect to this petition) shall be referred to as "Karis."

dissenting). A defense mental examiner opined that this environment "set the scene for the development of an acceptance of violence as the solution to social and interpersonal problems and a low opinion of women." App. A at 41-42 (quoting majority opinion). However, Karis's counsel decided not to call the mental examiner as a witness since there was the risk that the examiner would also have to disclose evidence damaging to Karis. App. A at 41-42.

In the penalty phase, the jury considered, inter alia, aggravating evidence that Karis had two prior separate rape convictions. App. C at 11. Karis's counsel called several witness and "elicit[ed] that Karis had exhibited artistic and academic talent, that his mother had been divorced and that he had saved his brother drowning when he was a child." App. A at 40-41. Karis's mother testified on her son's behalf that Karis saved his brother from drowning, but Karis's counsel did not ask her any questions about abuse. App. A at 42; App. C at 13.

After the California Supreme Court affirmed the judgment, pursuant to 28 U.S.C. § 2254, Karis filed a petition for writ of habeas corpus in federal court in 1990. App. A at 15. Karis raised a number of claims of ineffective assistance of counsel at the penalty phase. App. C at 69-104, 145-152.

Ultimately, the district court conducted an evidentiary hearing on Karis's claims of ineffective assistance of counsel in the penalty phase. *See* App. C at 69-104, 145-152. Karis's counsel testified by deposition that he did not ask Karis's mother about the abuse at the penalty phase "because he did not know what she would say and that she had denied the abuse." App. A at 42; *see also* App. C at 76. Both Karis and his mother "[f]or whatever reason," did not want to tell counsel "the full extent" of her prior life. App. A at 43.[2] Additionally, counsel

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2. Karis's mother testified by deposition that Karis's counsel never asked her about abuse and that if he had she would have testified about it. App. A at 42; App. C at 76-77.

did not want to open the door to damaging background information that the mother had about Karis. Opening Brief of Respondent – Cross-Appellant/Appellee ("OBR"), filed in the Ninth Circuit, at 94; Excerpts of Record ("ER"), filed in the Ninth Circuit, at 259.

In 1998, the district court rejected all but one of Karis's penalty-phase ineffective counsel claims. App. B at 3-4 (adopting magistrate's findings in full); App. C at 69-104, 145-152, 159. Despite the testimony of Karis's counsel, the district court granted Karis's petition on the basis of ineffective assistance of counsel in the penalty phase on the sole ground that Karis's counsel failed "adequately to investigate Karis' childhood, family situation and the serious abuse he suffered, and watched his mother suffer as a child . . . ." App. A at 37; *see also* App. C at 91-92, 95-96. The district court found no downside to presenting evidence of abuse and that Karis's trial counsel had offered no rational justification for failing to investigate family abuse. App. A at 37; App. C at 91-92.

In a split decision, the Ninth Circuit affirmed the district court. App. A at 7, 55; *see also* App. A at 56 (Kleinfeld, J., dissenting). The Ninth Circuit agreed that Karis's counsel reasonably decided not to call the mental examiner to testify about abuse. App. A at 41-42. However, the majority opinion held that even if Karis's mother herself had denied the abuse to counsel and was a potentially unpredictable witness on this subject, Karis's counsel was ineffective since he failed "to investigate the abuse through other family members and witnesses . . . ." App. A at 42. The Ninth Circuit majority faulted counsel for not explaining to Karis's mother "the gravity to her son in not testifying about the abuse." App. A at 43.

In dissent, Judge Kleinfeld chided the majority for

Neither the district court nor the Ninth Circuit found it necessary to resolve this conflict in the evidence. App. A at 42; App. C at 76-78.

treating "counsel's failure to put on evidence of an abusive childhood as *per se* ineffective assistance, without the deference to defense counsel's judgments required by *Strickland v. Washington.*" App. A at 56 (footnote omitted). "The problem in the majority's analysis arises because counsel investigated and discovered the abuse, but was precluded both by tactical considerations and by lack of cooperation from his witnesses from presenting it." App. A at 57. The dissent found Karis's case indistinguishable from this Court's opinion in *Burger v. Kemp*, 483 U.S. 776. App. A at 58-61.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has decided an important federal question in a way that conflicts with this Court's decision in *Burger v. Kemp,* 483 U.S. 776. The majority opinion reversed Karis's death sentence because of defense counsel's purportedly unreasonable failure to investigate and present mitigating evidence at the penalty phase. However, Karis's trial counsel opted not to introduce evidence of family abuse in mitigation for the strategic reason that Karis's mother had denied the abuse, had lied to the police, and neither Karis nor his mother wanted counsel to pursue the mother's "prior life." Additionally, counsel was concerned that extensive questioning of Karis's mother at the penalty phase would open the door to damaging background information that she had about Karis. The Ninth Circuit's rejection of this express strategy directly conflicts with *Burger*.

This decision is only the latest manifestation of a general pattern of analysis regarding ineffective assistance of counsel which conflicts with both *Strickland* and *Burger* by using "hindsight" to second-guess defense counsel's articulated tactical reasons. This analysis fails to accord the strong, deferential presumption that trial counsel's conduct might be considered sound trial strategy given the circumstances

confronting counsel at the time of trial. In particular, the Ninth Circuit fails to give the required heavy measure of deference to defense counsel's expressed reasonable professional judgment to conduct "less than complete" investigations into potential defenses and mitigating evidence.

SUMMARY OF ARGUMENT

I.

THE NINTH CIRCUIT'S DECISION THAT KARIS'S COUNSEL UNREASONABLY DECIDED NOT TO FURTHER INVESTIGATE OR PRESENT EVIDENCE OF CHILDHOOD ABUSE IN THE PENALTY PHASE, DESPITE COUNSEL'S ARTICULATED SOUND TRIAL STRATEGY, AMOUNTS TO A "NO MEASURE OF DEFERENCE" STANDARD FOR DEFENSE COUNSEL'S DECISIONS AS TO THE EXTENT AND LIMITATIONS OF DEFENSE INVESTIGATION

This case presents an ongoing question of the degree of deference to be accorded to a defense attorney's "strategic choice" to conduct a "less than complete" investigation of the law and facts relevant to plausible options in a case. *Strickland,* 466 U.S. at 690-91. Notwithstanding the reasonable explanation of Karis's defense counsel for his decision not to further investigate or present evidence of abuse experienced and witnessed by Karis during his childhood, the Ninth Circuit held that Karis's counsel's decision was objectively unreasonable. The decision also directly conflicts with this Court's decision

in *Burger v. Kemp*, 483 U.S. 776. App. A at 58-61 (Kleinfeld, J. dissenting). More significantly, the Ninth Circuit's decision guts the "heavy measure of deference" to be accorded counsel's "reasonable professional judgment" as to the extent and limits of trial preparation.

The easiest way to analyze the ominous implications of the Ninth Circuit's decision is to compare it with this Court's decision in *Burger v. Kemp*. In *Burger*, defense counsel offered no mitigating evidence even though there was evidence that Burger had an exceptionally unhappy and unstable childhood. Burger's attorney was aware of some of this family history. He talked to Burger's mother, a friend of Burger's, and a psychologist. Unfortunately, the psychologist opined that Burger's psychopathology would make him want to do wrong. The *Burger* court concluded that defense counsel's decision not to call any witnesses "may have been erroneous" but was not unreasonable. App. A at 58-59 (Kleinfeld, J., dissenting), quoting *Burger*, 483 U.S. at 788-93. While the *Burger* court concluded that counsel could have undertaken a more thorough investigation, the decision to interview no further witnesses was not constitutionally deficient, and the decision "not to mount an all-out investigation" was supported by "reasonable professional judgment." *Burger*, 483 U.S. at 794-95.

Karis's counsel did far more than Burger's, yet the Ninth Circuit found his conduct unreasonable. Karis's counsel actually did present mitigating evidence and did interview family members. *See* OBR at 22-23 (defense case); RT[3] 2511-2512, 2517-2528, 2530, 2531, 2533; OBR at 54-70; *see especially* OBR at 54-55, 56, 68-70.[4] Counsel was also aware of information that Karis had been abused and had witnessed

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3. "RT" refers to the reporter's transcript of the 1982 trial.

4. Counsel's efforts include the efforts of guilt-phase counsel. OBR at 68-70.

the abuse of his mother. App. A at 41. However, the mental examiner who provided the information could not testify because he would have had to also present evidence damaging to Karis. *See* App. A at 41-42. Furthermore, Karis's mother denied the abuse. OBR at 56-57; *see also* App. A at 42 (noting counsel's testimony). She was an unpredictable witness because of mixed motives concerning her relationship with Karis's stepfather and because she had previously lied to the police about Karis. App. A at 64 (Kleinfeld, J., dissenting); OBR at 95; ER at 260, 307; Supplemental Excerpts of Record ("SER"), filed in the Ninth Circuit, at 5120-5121. Karis's counsel ran genuine risks if he chose to present evidence of abuse. If he asked Karis's mother about the abuse at the penalty phase, it is possible that she might have denied the abuse. Alternatively, her testimony might have opened the door to damaging background information she had about Karis. OBR at 94 (a robbery Karis was involved in as a juvenile; his military discharge; his attempted prison escape; his involvement in a prison incident–which resulted in a killing).

If other witnesses had been used to elicit the abuse evidence, but Karis's mother was not asked about it, or if she was asked and denied it, the absence of such testimony or her denials might at a minimum have struck the jury as suspicious. As with *Burger*, the decision of Karis's counsel not to "mount an all-out investigation" was supported by reasonable professional judgment. In dissent, Judge Kleinfeld states correctly that in spite of the Ninth Circuit majority's conclusion that Burger's lawyer acted more strategically than Karis's,[5/] "there is simply no way to avoid the force of *Burger* in this case." App. A at 59-60.

The majority's problem with counsel's performance boils down to criticizing counsel for failing to pursue an abuse-mitigation strategy by somehow failing to convince Karis's

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5. App. A at 51 (majority opinion).

mother to testify about the abuse, or finding alternative witnesses to the abuse in lieu of Karis's mother. App. A at 42, 43. Yet, from the standpoint of Karis's counsel at the time of trial, these tactics posed serious risks due to the unpredictability of Karis's mother on this issue and the potential for impeachment. Given that this Court found Burger's counsel competent despite less preparation and less presentation of mitigating evidence, there is no way to characterize the *Karis* decision as anything but inconsistent with *Burger*.

The Ninth Circuit's decision in this case penalizes an attorney for declining to act against his better judgment. The attorney in this case articulated a tactical reason and the majority rejects that reason by speculating "[h]ow much more effective" it would have been to do it a different way. App. A at 51. Yet, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Nonetheless, the opinion in this case applies a retrospective analysis of "what ifs," "if onlys," and "what might have beens. . . ." The opinion will inevitably lead to the pitfalls of over-intrusive post-trial inquiry into attorney performance which this Court warned against in *Strickland* including "dampen[ing] the ardor and impair[ing] the independence of defense counsel, discourag[ing] the acceptance of assigned cases, and undermin[ing] the trust between attorney and client." *Strickland*, 466 U.S. at 690.

II.

THE NINTH CIRCUIT IS ENGAGING IN A GENERAL MODE OF ANALYSIS WHICH CONFLICTS WITH *STRICKLAND* AND *BURGER* BY USING HINDSIGHT TO SECOND-GUESS COUNSEL'S ARTICULATED TACTICAL REASONS FOR CONDUCTING "LESS THAN COMPLETE" INVESTIGATIONS WHICH "MIGHT" ACTUALLY CONSTITUTE SOUND TRIAL STRATEGY

On its own terms, the Ninth Circuit's *Karis* opinion is wrong. However, its significance is magnified when it is viewed as the apex of a pyramid of cases in which the Ninth Circuit has second-guessed counsel's decisions and applied the fabled twenty-twenty vision of hindsight, rather than applying the strong deferential presumption that trial counsel's conduct "'**might** be considered sound trial strategy.'" *Strickland v. Washington*, 466 U. S. at 689 (emphasis added); *Bell v. Cone*, __U.S.__, 122 S.Ct. 1843, 1852 (2002). The Ninth Circuit's opinion manifests an "absolute" proposition that a "less than complete investigation" of potential mitigation is unreasonable even if "reasonable professional judgments support the limitations on investigation." *Strickland*, at 690-91. Rather than viewing counsel's conduct in light of the circumstances existing at the time of trial, the Ninth Circuit utilizes an impermissible retrospective approach based on evidence presented years after the trial.

As already noted, Karis's trial counsel testified via deposition and explained the reasons why he did not ask Karis's mother any questions about past abuse. Despite what she may or may not have told Karis's mental examiner, Karis's counsel

remembered that Karis's mother denied that any abuse had occurred, and he did not know what she would say if she was asked about the subject at the penalty phase. App. A at 43. He also described Karis and his mother as resistant to telling him the full extent of the mother's prior life. App. A at 43.

Karis is not an isolated case in which the Ninth Circuit did not accord the presumption that trial counsel's conduct **might** be considered sound trial strategy. *See, e.g., Caro v. Calderon*, 280 F.3d 1247, 1257 (9th Cir. 2002) (*Caro II)* ("We have held that 'all relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase.'"), quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) (*Caro I*) (Caro was examined by four experts before trial; none of them indicated that Caro suffered from a mental impairment severe enough to constitute legal insanity or diminished capacity [*Caro I*, 165 F.3d at 1226]; nevertheless, the Ninth Circuit found that trial counsel had unreasonably failed to investigate the effects of exposure to pesticides on Caro's mental health [*Caro II*, 280 F.3d at 1257-58]; *see also Caro II*, 280 F.3d at 1259-60 [Kleinfeld, J., dissenting]); *Silva v. Woodford*, 279 F.3d 825, 837-40 (9th Cir. 2002) (in order to preserve trust with defendant, counsel chose not to investigate background evidence when defendant threatened to disrupt the trial and make the jury hate him if counsel contacted his parents); *Phillips v. Woodford*, 267 F.3d 966, 972, 978-80 (9th Cir. 2001) (the Ninth Circuit held that the attorney did not exercise sound trial strategy in deciding not to investigate other potential defenses even though the defendant told him his defense was alibi); *see also Phillips*, 267 F.3d at 988, 993 (Kleinfeld, J., dissenting) (Judge Kleinfeld notes that counsel found a witness tending to support the alibi); *Jennings v. Woodford*, 290 F.3d 1006, 1013-16 (9th Cir. 2002) (Ninth Circuit found unreasonable trial counsel's decision not to conduct investigation into potential mental defenses after being informed by prior counsel that a preliminary mental health exam had revealed that Jennings was "okay"); *Wade v.*

Calderon, 29 F.3d 1312, 1323-25 (9th Cir. 1994) (counsel unreasonable for summoning defendant's alternative personality during penalty phase in order to demonstrate mitigating factor of extreme mental or emotional disturbance); *see also Wade*, 29 F.3d at 1336, 1341-43 (Trott, J., dissenting); *Jackson v. Calderon*, 211 F.3d 1148, 1161-62 (9th Cir. 2000) (counsel unreasonably failed to investigate and produce evidence of difficult childhood even though defendant did not provide any such information and defendant's wife described defendant's relationship with his mother as good and affectionate); *see also Jackson*, 211 F.3d at 1166-67 (O'Scannlain, J., dissenting); *Visciotti v. Woodford*, 288 F.3d 1097, 1103, 1113-14 (9th Cir. 2002) *petition for cert. filed* 71 USLW 3117 (U.S. July 19, 2002) (No. 02-137); *petition for cert. filed* (U.S. July 22, 2002) (No. 02-5538) (Ninth Circuit found that counsel's conclusion that no jury could feel sympathy for Visciotti was an unreasonable basis for counsel to decide not to conduct an investigation into Visciotti's background to pursue a "sympathy defense"); *compare Strickland v. Washington*, 466 U.S. at 699 (counsel's decision not to further investigate defendant's background and mental health was reasonable given, inter alia, counsel's feeling of hopelessness about the success of such evidence); *see also Rios v. Rocha*, 299 F.3d 796, 805-07 (9th Cir. 2002) (counsel's expressed decision to present an unconsciousness defense over a misidentification defense made after talking to the defendant, reading the police report of the offense, reviewing a psychological report of the defendant and speaking to one eyewitness, according to the Ninth Circuit, constituted deficient performance); *see also Rios*, 299 F.3d at 814-15 (Fernandez, J., dissenting); *Gentry v. Roe*, ___ F.3d ___, No. 00-55691 (9th Cir. Aug. 8, 2002) [2002 WL 1808309] (despite weakness of defendant's testimony, majority finds defense counsel made unreasonable tactical choice in arguing that only the actual participants, not the attorneys, knew what really happened during the crime); *see also Gentry*, ___ F.3d ___ (Silverman, J., dissenting).

This Court has "consistently declined to impose mechanical rules on counsel. . . ." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). However, the Ninth Circuit's general rule requiring all mitigating evidence to be "unearthed" for the penalty phase is a "scorched earth" investigative rule that gives no deference to the "reasonable professional judgments"of counsel in the Ninth Circuit. *Strickland,* 466 U.S. at 690-91.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Dated: September 13, 2002

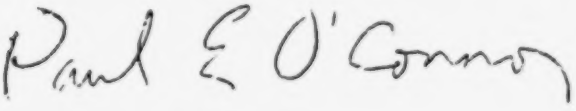
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APPENDIX

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LESLIE KARIS, *Petitioner-Appellee*, v. ARTHUR CALDERON, Warden, *Respondent-Appellant*.	No. 98-99025 D.C. No. CV-89-00527-JFM
JAMES LESLIE KARIS, *Petitioner-Appellant*, v. ARTHUR CALDERON, Warden, *Respondent-Appellee*.	No. 98-99026 D.C. No. CV-89-00527-JFM OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Kariton, District Judge, Presiding

Argued and Submitted
December 16, 1999-San Francisco, California

Filed March 18, 2002

Before: Procter Hug, Jr., James R. Browning and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Hug;
Partial Concurrence and Partial Dissent by Judge Kleinfeld

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court. The court held that penalty phase counsel's failure to investigate and present known substantial mitigating evidence of a capital defendant's child abuse and family violence can constitute ineffective assistance of counsel.

In 1982, appellee James Karis was convicted in California of first degree murder with special circumstances, attempted murder, kidnapping, and rape. Karis's penalty phase counsel presented mitigation evidence for only 48 minutes, eliciting witness testimony that Karis had exhibited artistic and academic talent, that his mother had been divorced, and that he had saved his brother from drowning when he was a child. There was evidence of abuse of Karis and of his mother by Karis's father and stepfather when Karis was a child in the report of Dr. Albert Globus. Karis's counsel had acknowledged that this evidence was relevant to the penalty phase case, but decided not to call Globus to testify because there was also damaging evidence in his report. Karis's counsel also stated that Karis and his mother did not want to tell him the full extent of Karis's mother's prior life. The prosecutor repeatedly stressed the absence of any testimony of mitigation throughout the penalty phase argument. The trial court imposed a judgment of death and sentenced Karis to an aggregate term of 41 years for the other offenses and enhancement allegations.

After unsuccessful state court appeals and habeas petitions, Karis petitioned for relief in federal district court, claiming, among other things, that his penalty phase counsel failed to investigate and present significant mitigating evidence of his childhood poverty, abuse, and the family dynamics. After making extensive findings of evidence of abuse, the district court found that Karis's counsel's failure adequately to investigate Karis's childhood, family situation, and the serious abuse he suffered, warranted reversal of the death penalty. The court ruled that there did not appear to have been any risk in presenting the mitigating evidence of abuse, that there was no indication that conducting a further investigation of abuse was not possible, and that counsel had provided no rational justification for his failure to pursue an investigation into Karis's history of family abuse. Considering the weak mitigation case put on, the prosecutor's focus on the lack of evidence of mental illness, and the strength of the evidence of abuse presented here, the court found a reasonable probability that had counsel properly investigated and presented evidence of abuse, the result of the penalty phase would have been different. Accordingly, the court found counsel's assistance unreasonable under the Sixth Amendment. Thus, the district court granted the petition as to the penalty phase of the trial based on counsel's failure to investigate and present evidence of child abuse and family violence, but denied as to all other claims.

The government appealed; Karis cross-appealed on the denied claims.

[1] Ineffective assistance of counsel claims involve a two-part inquiry. Karis had to show that his counsel's performance was deficient, that is, fell below an objective standard of reasonableness. In representing his client, trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. **[2]** Karis also had to show that the deficient performance prejudiced the defense, that is, that there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Such reasonable probability must be sufficient to undermine confidence in the outcome. To determine whether counsel's errors prejudiced the outcome of the trial, courts compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately.

[3] Karis's attorney had a duty to conduct reasonable investigation, including an investigation of Karis's background, for possible mitigating evidence. The sentencer must be able to consider and give effect to that evidence in imposing sentence. **[4]** The failure to present important mitigating evidence in the penalty phase can be as devastating as a failure to present proof of innocence in the guilt phase.

[5] While defense counsel offered its meager 48-minute presentation, the district court findings were replete with evidence of abuse that should have been uncovered and presented by counsel upon any reasonable investigation and representation. Counsel's failure to present such substantial

mitigating evidence was woefully inadequate and kept crucial information from the jury faced with sentencing Karis to life or death. **[6]** Although the decision not to use Globus to establish this childhood abuse was a tactical decision, counsel was on notice from Globus's report of substantial family abuse. Despite his conceded knowledge of this history, counsel failed to present any evidence of Karis's family abuse to the jury. This failure to investigate the abuse through other family members and witnesses was error of constitutional magnitude.

[7] The fact that Karis and his mother did not offer the information regarding the abuse did not excuse counsel from further investigation of such substantial mitigating evidence. This was particularly true where, as here, counsel was aware of the childhood abuse and there was essentially no other significant mitigating evidence to present to the jury. **[8]** Counsel could have offered substantial and wrenching evidence of Karis's violent and abusive childhood. It should at least have been presented by the mother and others who could verify it for a jury to consider. **[9]** Karis's counsel had the opportunity to show that Karis grew up seeing his mother regularly and violently abused by men. Such evidence is particularly compelling mitigating evidence in a rape case.

[10] Counsel's error in failing to investigate and present the highly relevant information of an abusive childhood, was prejudicial. **[11]** Based on the weak mitigation case presented, the prosecutor's focus on the lack of mitigating evidence, and the substantial evidence of abuse presented to the

district court, a reasonable probability existed that had counsel properly investigated and presented evidence of abuse, the result would have been different. In light of the whole record, and despite the substantial evidence of aggravation, the failure of counsel to present mitigating evidence made the sentencing neither fair nor reliable. **[12]** The judgment of the district court had to be affirmed.

Judge Kleinfeld concurred in part and dissented in part, writing that the majority opinion mistakenly treated counsel's failure to put on evidence of an abusive childhood as per se ineffective assistance, without the required deference to defense counsel's judgments.

COUNSEL

Norman J. Hile, Sacramento, California, for the petitioner.

Paul E. O'Connor, Deputy Attorney General, Sacramento, California, for the respondent.

OPINION

HUG, Circuit Judge:

The Warden of the California State Prison, San Quentin, appeals the district court's order granting in part the 28 U.S.C. § 2254 habeas corpus petition of James Karis, who was convicted in 1982 of first degree murder with special

circumstances, attempted murder, kidnaping, and rape. The district court granted the petition as to the penalty phase of the trial based on counsel's failure to investigate and present evidence of child abuse and family violence. Karis cross-appeals the denial of the remainder of the petition. We conclude that the district court properly denied Karis' claims with regard to the conviction of murder. We further agree with the district court that counsel provided Karis constitutionally ineffective assistance at the penalty phase. Accordingly, we AFFIRM.

FACTS

The evidence produced at the state court trial presented the following facts. On July 8, 1981, Ms. P and Ms. V were taking a brief walk during their midmorning break from their jobs in Placerville, California. At approximately 10:30 a.m., as they were walking under an overpass, a man ordered the women at gunpoint to enter his car. They entered the back seat and the man drove some distance out of town, drove off the road, stopped the car, and ordered the women to walk down a dirt path to a creek bed. They followed the creek bed to an area where the man ordered the women to disrobe.

Ms. P was gagged and her hands tied and Ms. V was raped. The man then ordered the women to continue walking down the creek bed. When they reached a large hole, the man ordered both women to get into the hole. In reply to Ms. V's plea that she not be killed, the man stated that he had to kill

them so that he would not be killed. The women turned away from the man and Ms. V heard five shots. She felt a numbness in her neck after the second shot and felt the impact of a second bullet in her neck with the fourth shot. She feigned death and heard the man throwing rocks on her and Ms. P.

After hearing him leave, Ms. V waited several minutes before making her way out to the road where she flagged down a truck driver who then flagged down a car on the highway to take Ms. V to Chili Bar where the sheriff and medical help were summoned. Ms. V described Ms. P's location to the truck driver who remained near the highway to guide emergency personnel. Shortly thereafter, a paramedic examined Ms. P and determined that she was dead. The cause of death was one of three bullet wounds and a fracture through the base of her skull.

The truck driver testified that Ms. V described her assailant as a man with long dark hair and a green car. According to an officer at Chili Bar, Ms. V described her assailant as "a male Mexican, 5'8" to 5,10", heavy build, with a moustache and at least a one-day-old beard." She also told him that her assailant drove a "ratty old big car, green in color, two-door." The officer who accompanied her in the ambulance from Chili Bar to the local hospital testified that she described her assailant "as having dark, shoulder-length hair, medium-dark moustache, five foot eight to ten inches tall, wearing a white T-shirt, blue jeans, and possibly of Mexican descent." The officer who interviewed Ms. V in the hospital

emergency room testified that she gave a similar description of her assailant and his car.

Ms. V testified that one or two days after the shooting she told a police detective that her assailant "was a little taller than I was, around five ten, and that he had shoulder length hair, maybe a little bit longer, and that it was dark hair, black hair, and it was curly or wavy, and that he had a moustache that was like a Fu Manchu style, and he hadn't shaved for a couple of days." She also testified that on that same occasion she stated that she didn't know his nationality, but it could be Mexican, Indian or Italian - that he had dark skin and dark hair.

Analysis of a stain on Ms. V's underwear indicated the presence of seminal fluid. The stain was also tested for phosphoglucomutase (PGM) enzyme type and for blood type. At trial, an expert called by the prosecution testified that PGM was a genetic marker found in body fluids and that the PGM enzyme type of the seminal fluid was the same as Karis'. The same expert also testified that Karis was a non-secretor and so, his AB blood type would not show up in other body fluids such as semen or saliva and that only Ms. V's blood type was found in the stain. This expert further testified that 4% of the population were non-secretors with Karis' PGM type. On cross-examination the expert did acknowledge that approximately one out of four persons in the population could have been the source of the seminal fluid. Ms. V's husband, however, was ruled out as a source of the fluid.

Ms. V had initially described the car in which she had been abducted as an old, large green two-door car of American make. At trial, she testified that the car was an older, large, two door car, which was two-tone and light green with a dark interior and a vinyl top. Detective Southern testified that on July 8, Ms. V also told officers about objects in the car. At trial, she testified that she had seen a black cool cushion and two rectangular pillows, one a dark color and the other a bright color. On July 9, officers impounded Karis' car and removed three pillows from the back seat. On July 10, Ms. V was shown the pillows and stated that they looked like the ones she had seen in the car.

Karis' neighbor David Marden testified that, on the afternoon that was determined to be July 8, 1981, he saw Karis driving up to the house much faster than he had ever seen him drive before. On the evening of July 8, Karis' brother Kevin Jones and Kevin's girlfriend, Dana Skelton, drove to the house that Karis shared with his mother and Kevin. Dana testified that after Kevin stopped to speak to a deputy sheriff parked at the foot of the driveway, he drove up to the house and spoke to his mother. He returned to the car and told Dana that he had to take her home and that they had to take Karis with them in the trunk of the car because Karis was dealing in cocaine. After they left the house with Karis hidden in the trunk, Karis joined Dana and Kevin in the passenger compartment of the car. Dana testified that Karis had a moustache and a little bit of a beard at that time. They drove to Dana's grandmother's home where they spent the night. The next morning, July 9, Kevin promised

Dana that he would drive her to work but later told her that he could not because Karis had to leave. Ten minutes later, the two men left. Dana's grandmother described the man who had stayed at her home as having a fairly long moustache and dark hair. She identified a photograph of Karis.

Around noon on that day, July 9, Karis arrived at the home of friends Peggy Steuben and Jay Raugust in Rancho Cordova. Steuben testified that Karis was quiet, withdrawn, and clean shaven. Karis asked if he could stay with them a couple of days and Steuben refused. Karis left around 7:30 that evening. Steuben also testified that Karis earlier had visited Rancho Cordova on July 4, 1981. During that visit she and Karis talked about keeping a gun for self-defense. Karis told her "[t]hat because of where he had been, in prison, that, you know he would never want to go back there again and it was self-defense to not leave a - you know, to eliminate anybody that could send him back there." During the discussion Steuben commented that it would be a particularly horrible thing to kill a rape victim and Karis responded "[t]hat he — leaving any witness to testify, that —- that he had committed any certain crime or anybody else had committed any certain crime would be sending him back to prison, and it would be necessary to not leave a witness."

Prior to trial, Kevin Jones suffered a stroke. By stipulation that he was mentally and physically incompetent to testify, portions of his preliminary hearing testimony were read to the jury. Parts of Kevin's testimony differed significantly

from trial testimony of Karis and Dana Skelton. Kevin testified that on the morning of July 8, 1981, the day of the murder, he, Karis and their mother went to Placerville to cash a check at the Lucky Market, and then went to the post office to buy a money order. Kevin stated that they drove back to their home between 9:30 and 10:00 that morning and that he and Karis remained at home the entire day except for checking the mail and going out for a beer. Kevin also stated that Karis had shaved his moustache off a week before. Kevin claimed to have spent the night of July 8 with Dana Skelton, arrived home the next morning around 8:00 a.m., and driven Karis to the bus station around 9:00 a.m.

Kevin was interviewed several times before trial and officers testified that Kevin made contradictory statements. On the night of July 9, 1981, he told an officer that when he woke at 10:00 a.m. on July 8, the day of the murder, the car was gone. He also told officers that Karis had a moustache on the morning of July 8, but shaved it off the following morning telling Kevin to tell anyone who asked that he had shaved it off a week earlier.

Karis testified that on July 8, 1981, he arose at 7:30 a.m., shaved, and drove alone to Placerville where he cashed his unemployment check at the supermarket and purchased a money order which he mailed to his landlord. He claimed to have returned home by 10:15 a.m. where he remained until 1:30 p.m. when he and Kevin drove to Georgetown Springs where they drank beer and returned home around 3:30 p.m. Karis

testified that Kevin left in the family car at about 6:30 p.m. and returned later that evening, driving Karis away hidden in the trunk because of the patrol car on the property which Karis assumed was there because of marijuana he was cultivating.

Karis claimed that he returned home on July 9 and then decided to leave and visit some friends until he could find out what was happening. Kevin drove Karis to the bus station and from there Karis walked to an on-ramp to Highway 50 and hitched a ride to Steuben's house. When Kevin informed him that the police were looking for him he shaved his moustache, trimmed his sideburns, cut his hair and spent the next several days sleeping along the American River.

On July 15, 1981, Karis kidnaped two women and the five-month-old son of one of them in Sonoma County. The women had been playing tennis at a Fairfax park and when they returned to their van, Karis ordered them inside at knife point and forced the owner of the van to drive northward. The women testified that he told them that he was a murderer, wanted for murder and had nothing to lose. The owner of the van testified that she heard Karis tell the other woman to remove her clothes but when the van owner said that she could not drive safely if nervous and asked Karis to return to the front seat, he did so. She further testified that he told her that he would not hurt them if they cooperated, meaning that he would not break any bones or kill them, "but rape they could live with." The other woman in the van also testified about this incident. The van owner testified about attempting escape from

the van when Karis stopped to make a phone call at a service station, where she managed to attract a gas station attendant's attention before Karis grabbed her hair, flung her to the floor, and told her he was going to kill her.

Karis fled from the gas station to a mobile home park where he forced his way into a mobile home. The mobile home occupant testified that Karis pressed a knife to her stomach and demanded her car keys. It was there that Karis was apprehended.

On July 15, 1982, a Sacramento County jury convicted Karis of: (a) the first degree murder of Ms. P, with special circumstances of murder in the commission of kidnaping and in the immediate flight from rape, (b) the attempted murder of Ms. V, (c) the kidnaping of Ms. P and Ms. V, and (d) the rape of Ms. V. He was found to have personally used a firearm in the commission of each offense and to have intentionally inflicted great bodily injury in the commission of the attempted murder and kidnaping offenses.

Following a penalty trial, the jury returned a verdict of death. On September 17, 1982, the trial court imposed a judgment of death and sentenced Karis to an aggregate term of 41 years for the other offenses and enhancement allegations.

In 1986, Karis filed a direct appeal from the conviction and a single issue petition for a writ of habeas corpus, challenging trial counsel's failure to attempt to exclude

the testimony of Karis' brother and of a police officer. In *People v. Karis*, 46 Cal. 3d 612 (1988), cert. denied, 490 U.S. 1012 (1989), without holding an evidentiary hearing, the California Supreme Court affirmed the judgment and denied the petition.

Karis' appellate counsel withdrew from the case after the United States Supreme Court denied a petition for a writ of certiorari. In 1989, Karis filed an application for appointment of counsel in federal district court. Counsel was appointed in May of that year and on March 26, 1990, Karis filed a petition containing a number of unexhausted claims and, after some discovery, he amended it to add further claims.

On September 4, 1990, with Karis and counsel for both parties present, the court held a hearing to determine whether there were any claims not identified in the amended petition. Later that month, the parties agreed upon the identity of all unexhausted claims and those proceedings were stayed pending exhaustion of state remedies. Karis filed a second state habeas corpus petition in July 1991 and the California Supreme Court ordered informal briefing. The State argued that Karis had failed to explain the delay in raising these claims.

Karis filed an amended petition which included a brief explanation of the proceedings in the district court and an additional claim not contained in the July petition. Without explanation, the California Supreme Court treated this amended petition as a new one and the State did not file an opposition to

the amended petition. In October 1991, in a nine-paragraph minute order, the California Supreme Court denied the July petition. The court denied the amended petition in a two-line order in February 1992.

In March 1992, after Karis informed the district court that he had exhausted his state remedies, the court reopened the case. Karis filed a second amended petition on April 3, 1992. This is the final petition in this action.

The district court affirmed the recommendation of the Magistrate Judge to deny the State's motion to dismiss procedurally defaulted claims. The Magistrate Judge granted in part Karis' motion for an evidentiary hearing. That hearing commenced on February 1, 1995. The Magistrate Judge took evidence in court through the end of February and, with the parties' consent, received other testimony in the form of depositions. The parties submitted final briefs on the merits of all claims and on May 29, 1997, the Magistrate Judge issued his Findings and Recommendations. The Magistrate Judge recommended that Karis' petition be granted as to the penalty phase of the trial on the basis of trial counsel's failure to investigate and present evidence of child abuse and family violence, but that it be denied on all other claims.

Both parties filed timely objections to these Findings and Recommendations and both replied to the other's objections. The district court heard oral argument on the parties' objections and the parties submitted additional briefs. On

August 3, 1998, the district court adopted the Findings and Recommendations of the Magistrate Judge and entered the final judgment.

JURISDICTION

The district court had jurisdiction over Karis' petition pursuant to 28 U.S.C. § 2254. The State filed a timely notice of appeal on August 25, 1998, from the August 3, 1998 judgment, as did Karis on August 26, 1998. On August 31, 1998, the district court granted the State's motion to stay its judgment pending finality of the parties' appeals to this Court and Karis' application for a certificate of probable cause.

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-122, 100 Stat. 1214 ("AEDPA") regarding the issuance of a certificate of appealability ("COA") as a predicate to review in the court of appeals apply to all cases in which the notice of appeal was filed after AEDPA's effective date, regardless of whether a certificate of probable cause has already been issued. *See Slack v. McDaniel*, 529 U.S. 473, 482-83 (2000). Karis appeal falls within this category of cases. Therefore, consistent with Slack, we treat Karis' notice of appeal in this case as an application for a COA. *See id.*; *Schell v. Witek*, 218 F.3d 1017, 1021 n.4 (9th Cir. 2000) (en banc). We conclude that Karis has made the requisite "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and we grant the COA and exercise jurisdiction over these issues pursuant to 28 U.S.C. § 2253 and

Rule 22 of the Federal Rules of Appellate Procedure.[1]

STANDARD OF REVIEW

We review de novo a district court's denial of a petition for habeas corpus. *See Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1998). "However, findings of fact made by the district court relevant to the denial of [petitioner's] habeas corpus petitions are reviewed for clear error." *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995).

DISCUSSION

I. Guilt Phase Claims

We review the district court's decision not to conduct an evidentiary hearing in a habeas proceeding for abuse of discretion. *Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993). A habeas petitioner must meet two conditions to be entitled to a federal evidentiary hearing: (1) allege facts which,

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1. We note, however, that even though the provisions of the AEDPA apply to the issue of whether Karis is entitled to a certificate of appealability, pre-AEDPA law applies to the merits of the habeas petition because Karis filed his petition in district court before the effective date of the AEDPA. *See Slack v. McDaniel*, 529 U.S. 473, 479 (2000); *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1999).

if proven, would entitle him to relief, and (2) show that he did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding. *See Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992).

Here, the district court correctly found that substantial unchallenged evidence of guilt exists. We agree that even if the facts Karis alleges are proven, Karis would still not be entitled to relief on his guilt phase claims and, thus, the district court did not abuse its discretion in denying Karis an evidentiary hearing for these claims. *See id.* Karis relies on our precedent that in a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court. *See Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994). Notwithstanding that language, Karis' claim fails because even assuming his allegations to be true, they do not entitle him to habeas relief. *Hendricks*, 974 F.2d at 1103.

A. Prosecutorial Misconduct

Karis contends that the prosecutor committed misconduct by preventing defense counsel from interviewing Peggy Steuben and by manipulating her testimony. Steuben testified that on July 4, 1981, she had a conversation with Karis and he told her that he would eliminate anyone who could send him back to prison. Steuben now seeks to clarify the context of the conversation and that Karis only casually made general

comments to that effect. Steuben's most recent account is that Karis said that "as an ex con he wouldn't be treated fairly and he could understand how he or someone like him could kill the victim of a crime to stay out of prison as a matter of self defense."

Even taking Steuben's most recent statements as true, they have minimal if any effect on the case as she did not recant her testimony, rather merely put her comments of the conversation in a slightly different context. Additionally, as described above, there was sufficient evidence without Steuben's declaration to identify Karis as the killer and to show premeditation. A surviving victim gave numerous consistent descriptions of Karis as well as a positive identification of him and of pillows found in his car that she recognized from the car in which she was abducted. The evidence showed that he forced the victims into his car at gunpoint, drove to a remote location, raped one, and then walked them at gunpoint to a large hole where he forced them to kneel while he shot them.

Even assuming Karis' allegations to be true, we are precluded from granting Karis' request for relief on the basis of the mere presence of prosecutorial misconduct without any concomitant prejudice. *Thomas v. Cardwell*, 626 F.2d 1375, 1382 (9th Cir. 1980). Even if Karis could establish that Steuben's testimony at trial was manipulated, to be entitled to relief on that ground he would also need to show a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Young*, 17 F.3d 1201,

1203 (9th Cir. 1994) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). We agree with the district court's finding that given the extent and weight of the other identification and premeditation evidence there is no reasonable likelihood that Steuben's testimony affected the guilty verdict.[2/]

Karis further alleges that Russell Herman, the prosecutor's investigator intimidated Steuben to manipulate her testimony by falsely telling her that (1) Karis was a member of the Aryan Brotherhood whose associates would kill her at Karis' orders; and (2) that he would influence favorably her pending child custody battle if she was willing to testify. Steuben now asserts that Herman told her not to talk to the defense. Herman testified that Steuben told him Karis was an Aryan Brotherhood member and that when Steuben told him she did not want to talk to Karis' attorney, Herman told her she did not have to talk with anyone if she did not want to.

Karis further alleges that Herman's failure to disclose that he had a number of interviews with Steuben, that he felt that Steuben was under the influence of drugs during some of the interviews and that her story changed frequently among interviews constituted prosecutorial misconduct. To prevail

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2. Because we affirm the district court's decision to grant Karis' petition for ineffective assistance of counsel in the penalty phase, we do not reach Karis' claim with regard to the prosecutor's having mentioned Steuben's testimony during the penalty phase.

under a claim that the government withheld exculpatory evidence, Karis must establish that the any such evidence withheld was material. Evidence is material if there is " 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Paradis v. A rave*, 240 F.3d 1169, 1176 (9th Cir. 2001) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "reasonable probability" is a probability "sufficient to under- mine confidence in the outcome." *Id.*[3/]

We need not decide whether any alleged prosecutorial misconduct did occur, because even assuming Karis' allegations are true, Karis is not entitled to relief based on these claims. As described above and as the district court found, there was substantial evidence implicating Karis at the guilt phase. Karis' allegations of prosecutorial misconduct present neither structural error nor a "deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct" which might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. *See Brecht*

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3. In *Paradis* we held that evidence is material if it could have been used to impeach a key prosecution witness sufficiently to undermine confidence in the verdict. *Id.* at 1179. As discussed below, Steuben's testimony does not meet this standard because even excluding her testimony altogether, sufficient evidence remained to allow confidence in the guilty verdict.

v. Abrahamson, 507 U.S. 619, 638 n.9 (1993).[4]

Thus, it is clear that Karis is not entitled to habeas relief based on this alleged error unless he can establish that it resulted in "actual prejudice." *Id.* at 637. Karis' alleged errors warrant a grant of habeas relief only if, in light of the record as a whole, the alleged error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 638; *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) (prosecutorial misconduct subject to harmless error); *Bentley v. Scully*, 41 F.3d 818, 822 (2d Cir. 1994) (applying *Brecht* harmless error test to claim of prosecutorial misconduct). We think it clear that, even taking Karis' allegations as true, he cannot make this required showing.

B. Improper Presentation of Testimony

Karis alleges that if Steuben had testified truthfully,

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4. Karis' argument that Chapman review for error "harmless beyond a reasonable doubt" is required where no such analysis was conducted in state court review, is foreclosed by our decision in *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000). In *Bains*, a panel of this Court held that the *Brecht* standard applies to all § 2254 cases, regardless of the type of harmless error review conducted by the state courts. We therefore reject Karis' invitation to perform a *Chapman* analysis. Moreover, the district court found these alleged errors harmless beyond a reasonable doubt under *Chapman*.

her testimony would have been excluded as irrelevant because his statements to Steuben did not refer to the crime for which he was tried. The California Supreme Court concluded that Steuben's testimony was admissible as evidence of Karis' state of mind. *People v. Karis*, 46 Cal.3d 612, 636-67 (1988). Karis maintains that absent prosecutorial misconduct, Steuben's testimony that Karis made general statements would not have satisfied the state-of-mind exception to the hearsay rule. He further claims that this allegedly improper presentation of testimony to the jury violated due process.[5/] Again, even if we assume the truth of this claim of prosecutorial misconduct, Karis' failure to establish prejudice precludes us from granting him relief on this basis. Even assuming the alleged misconduct did occur, such error under the circumstances here is harmless and, thus, cannot warrant habeas relief. *Id.*

Finally, Karis argues that he has alleged such an

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5. Karis' argument here is couched in terms of a prosecutorial misconduct claim, i.e., that but for the misconduct this evidence would have been excluded. To the extent that Karis argues that the evidentiary ruling was incorrect and violated due process, we reject that claim as well. To obtain habeas relief on such a claim Karis must demonstrate that admission of this testimony so fatally infected the proceedings it rendered his trial "so fundamentally unfair as to amount to a denial of [his] constitutional right to due process." *Kealohapauvie v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986). Karis fails to meet this standard.

egregious pattern of prosecutorial misconduct that it cannot be deemed harmless error. In the "unusual case such error might be "deliberate and especially egregious" or so "combined with a pattern of prosecutorial misconduct" as to "infect the integrity of the proceeding[s]." *Brecht*, 507 U.S. at 638 n.9. In making this determination, we must consider whether a combination of misconduct and error so infected the entire proceeding as to destroy its fairness. *Hardnett v. Marshall*, 25 F.3d 875, 879 (9th Cir. 1994). As discussed above, in light of the substantial evidence even without this disputed testimony of identification and premeditation Karis does not present such a case and, thus, we cannot grant his requested habeas petition on this ground.

C. Juror Misconduct

Karis alleges that, sometime after the testimony of Dr. Loftus, his identification expert, a juror asked a librarian at the public library whether it carried any books authored by Dr. Loftus. The juror later reported to other jurors that the library did not have any such books. The district court found that this conduct occurred during the penalty phase. Based on the evidence presented to the district court, we conclude that this finding was not clearly erroneous. Because we agree with the district court that Karis is entitled to habeas relief for the penalty phase based on constitutionally ineffective assistance of counsel, we do not address the issue of potential prejudice this juror misconduct had at sentencing.[6/]

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6. Karis also alleges that one or more jurors consulted

D. Ineffective Assistance of Counsel

1. Kevin Jones' Testimony

Karis argues that counsel was ineffective for failing to object to admission of his half-brother Kevin Jones' preliminary hearing testimony, for failing to move for exclusion of testimony regarding Kevin's statements to the police, and for consenting to the introduction of these statements. Kevin testified at the preliminary hearing, but suffered a stroke before trial and this testimony was read into the record. Parts of Kevin's testimony contradicted Karis' testimony and Kevin's preliminary hearing testimony was easily impeached by the prosecution because he had given a number of conflicting prior statements.

To establish a claim for constitutionally ineffective assistance of counsel, Karis must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) (en banc) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)) (internal quotation marks omitted). In determining whether

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the dictionary for the definition of "circumstantial." The district court found the evidence insufficient to establish juror misconduct regarding the word "circumstantial" and we are not convinced that this finding was clearly erroneous. Accordingly, we decline to further address this claim.

Karis received the reasonably effective assistance to which he was entitled, we must determine whether counsel's representation " 'fell below an objective standard of reasonableness.' " *Id.* (quoting *Strickland*, 466 U.S. at 687-688). In so doing, we "will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight," *id.*, but will defer to counsel's sound trial strategy. *See id.*

Karis must also show that the deficient performance prejudiced him. In doing so, he must present a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

The district court found counsel's conduct reasonable in regard to the admission of Kevin's testimony. Karis' lead trial counsel stated that he was aware that Kevin's inconsistent statements could have been kept from the jury. He declared that his purpose was to put those statements before the jury in hope that he could persuade the jury to believe at least one part of Kevin's testimony — that Karis had arrived home from Placerville on July 8, 1981, by 10 a.m. — in order to corroborate Karis' alibi. In closing argument, defense counsel attempted to support Karis' alibi by pointing out that Kevin's first statement to the police corroborated Karis' story. Defense counsel testified in his deposition that Kevin's first statement to the police was the only available corroboration of Karis' alibi.

Furthermore, we agree with the district court that Karis was not prejudiced by counsel's failure to object to the evidence. There is not a reasonable probability that exclusion of this testimony would have changed the result of the proceeding.

2. Substance Abuse

Karis also contends that evidence of his use of methamphetamines immediately preceding the crime could have explained his flight and the subsequent events in Sonoma County. Karis argues that trial counsel's failure to introduce this evidence rendered his assistance constitutionally ineffective. Even assuming that Karis could show that counsel acted unreasonably, Karis has not shown prejudice. Karis testified that he fled because he feared arrest for a parole violation as he was cultivating marijuana, a claim corroborated by evidence. While additional testimony of a drug-induced paranoia would have provided additional support for his testimony, counsel's failure to present it does not undermine our confidence in the outcome of the proceedings and, thus, does not warrant the requested relief.

3. Genetic Marker Testing

Karis also claims that trial counsel should have objected to genetic marker testing evidence on the basis that the scientific method used was unreliable. Specifically, Karis targets the prosecutor's questions to James Streeter, the State's

expert, that resulted in Streeter stating that only four percent of the population consisted of non-secretors, such as Karis. On cross-examination, however, defense counsel elicited Streeter's testimony that twenty-four percent of the male population could have contributed the semen. Defense counsel further clarified in his closing argument the significance or lack thereof of the statistics by describing how the prosecution stopped questioning Streeter after Streeter stated that only four percent of the population has Karis' blood type. Counsel explained that twenty-four percent of the population could have contributed the semen — "[t]hat means that if there were twelve male jurors in this case, three of them could have contributed that semen."

Trial counsel performed reasonably by discrediting the genetic marker testing evidence through his cross-examination of the State's expert and his closing argument. Even assuming arguendo that he did not, we agree with the district court's conclusion that Karis has failed to show that he was prejudiced by the testimony under the *Strickland* standard.

E. Instructional Errors

Karis argues that the trial court's jury instructions erroneously barred the jury from considering his parole status as an explanation for his flight by limiting its consideration of the fact that a witness had been convicted of a felony. Specifically, the challenged instruction read as follows:

> The fact that a witness . . . had been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of the witness. The fact of such conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

The purpose of such an instruction is to prevent the jury from disregarding the testimony of a witness such as Karis merely because there was evidence that he had been convicted of a prior felony. It also serves to prevent the jury from using his prior conviction as evidence that he committed the current offense.

Karis contends that he fled because he was cultivating mar- ijuana while on parole and feared being sent back to prison for such a parole violation. His explanation was supported by his neighbor David Marden who testified that Karis was growing marijuana and that he believed Karis left home out of fear of discovery. Still, Karis maintains that his parole status was critical to rebut the prosecution's argument that his flight reflected consciousness of guilt for the charged crimes. The trial court also read the jury the following "flight instruction":

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient, in itself, to establish his guilt, but is a act

> which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence.
>
> Whether or not evidence of flight shows consciousness of guilt and the significance attached to such circumstances are matters for your determination.

The trial court rejected Karis' request that this instruction include the possible reasons, other than consciousness of guilt, for his flight. Karis testified at trial that he fled because of his parole status and defense counsel argued this to the jury.

Instructional error will not support a petition for federal habeas relief unless it is shown "not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' " but that by itself the instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). Karis has not made such a showing based on his allegations of instructional error. Many instructions were given regarding the evaluation of witness testimony and evidence generally. The instructions that Karis challenges could also have worked to his benefit to alleviate potential prejudice from consideration of his previous conviction and parole status, as could the flight instruction which clarified that flight alone is insufficient to establish guilt. These instructions did not direct the jury to ignore Karis' explanation for his flight.

The challenged instructions did not render Karis' guilt trial fundamentally unfair and, thus, did not violate due process. Furthermore, even assuming Karis could meet that standard, which he did not, Karis' claims of instructional error fail to establish a constitutional violation that had a substantial and injurious influence on the jury's verdict. *See Brecht*, 507 U.S. at 638.[7]

F. Cumulative Error

Although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial. *See Ceja v. Stewart*, 97 F.3d 1246, 1254 (9th Cir. 1996). That is not the case here. Karis has not shown the cumulative effect of the alleged errors deprived him of due process. *See id.*

II. Penalty Phase Claims

A. Ineffective Assistance of Counsel[8]

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7. As discussed above, our precedent forecloses claims such as Karis' that we must apply Chapman as the standard of review where the state court did not. *Bains*, 204 F.3d at 977.

8. The State argues that this claim, among others, is procedurally barred under California's timeliness rule that a habeas petitioner must assert all claims known to him in a timely manner, and must fully explain and justify any

[1] Ineffective assistance of counsel ("IAC") claims involve a two-part inquiry. Under *Strickland*, Karis must show that his counsel's performance was deficient, that is whether his performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In representing his client, trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes

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substantial delay. We have previously recognized that " '[i]n order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.' " *Morales v. Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996) (quoting *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994)). In *Morales*, we held that California's timeliness rule, as applied to Morales and before its further elucidation in *In Re Clark*, 5 Cal. 4th 750 (1993), did not afford an adequate and independent state ground barring federal review of Morales's claims. *Morales*, 85 F.3d at 1393. The California Supreme Court denied Karis' last amended habeas petition in February 1992. Thus, as in Morales, California's rule on timeliness which Clark attempted to clarify in 1993, was not "clear, consistently applied, and well-established" at any time after Karis' convictions were affirmed and before he filed his first state habeas petition. *See id.* Accordingly, Karis' claim of ineffective assistance of counsel in the sentencing phase is not procedurally barred. *See also Morris v. Woodford*, 229 F.3d 775, 780 (9th Cir. 2000) (holding that "untimeliness" bar from Clark was not an independent and adequate state-law ground).

particular investigations unnecessary." *Strickland*, 466 U.S. at 691.[9/]

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9. The district court opinion cited the expert testimony of a criminal law specialist. The district court stated that he testified without contradiction that the standard of practice required penalty phase counsel:

> to investigate, prepare and consider presenting evidence of the client's family history, including family dynamics, any physical abuse, mental and physical illness, and the family's socioeconomic status. Then, as now, every juror wanted to know where the defendant came from and how he came to site before them convicted of a capital crime. Jurors intuitively understand that some people are dealt a poor hand in life, through their genetic and social inheritance and their family environment. Penalty phase counsel was required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history. In particular, defense counsel was required to attempt to find and interview: the client, members of the client's immediate family, relatives and acquaintances who were percipient witnesses to the life history of the client, his parents and his immediate family, friends, ...

[2] Karis must also show that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To make this showing, Karis must prove that "there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Bonin*, 59 F.3d at 833. Such "reasonable probability" must be sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. To determine whether counsel's errors prejudiced the outcome of the trial, we must compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately. *Bonin*, 59 F.3d at 834.

1. Deficient Performance

Magistrate Judge Molde heard testimony for over two weeks and evaluated the credibility of the witnesses and the evidence presented in a well reasoned and documented 103 page opinion. The district judge stated that he carefully reviewed the entire file and found the findings and recommendations of the magistrate judge to be supported by the record and by proper analysis and adopted them in full. The magistrate judge's recommendations thus becomes the opinion of the district court.

The opinion of the district court considered and rejected a number of claims of ineffective assistance of counsel

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The district court observed that "Respondents presented no expert opinion to the contrary."

that may be summarized as follows:

a. The failure to examine the family history of mental illness was rejected because "counsel in 1982 was not constitutionally compelled to do the extent of family history research that petitioner's counsel now presents."

b. The failure to investigate drug abuse was rejected because "[p]etitioner has shown neither unreasonable conduct nor prejudice under *Strickland*."

c. Thee failure to present evidence of mental illness was rejected stating: "although further effort by counsel might have yielded a better result, counsel's effort fell within the wide range of reasonable assistance described in *Strickland*."

d. The failure to present evidence of Karis' military record was rejected because "[t]his was a reasoned tactical decision."

e. The failure to object to the trial court's consideration of a probation office report was rejected because "petitioner has not shown a reasonable probability that, had

> counsel objected, the trial court would have overturned the jury's death verdict."

The careful consideration and rejection of these arguments concerning the ineffective assistance of counsel claims highlights the care with which the district court considered all of the ineffective assistance of counsel claims and in turn the care with which it entered its findings concerning the one ineffective assistance of counsel claim that it determined required the reversal of the death penalty aspect of the judgment. The district court found that counsel's failure adequately to investigate Karis' childhood, family situation and the serious abuse he suffered, and watched his mother suffer as a child, warranted reversal of the death penalty. The court's ultimate finding concerning counsel's deficient performance was:

> There does not appear to have been any risk in presenting the mitigating evidence of abuse. In addition, there is no indication that conducting a further investigation of abuse was not possible. There is no showing that counsel lacked the time or money to conduct further investigations. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Petitioner's trial counsel has provided no rational justification for his failure to pursue an investigation into petitioner's history of family abuse. Accordingly, the court finds

counsel's assistance unreasonable under the Sixth Amendment.

With regard to the prejudice of counsel's failure to investigate, the district court found:

> [H]ad counsel performed a proper investigation he could have offered substantial and wrenching evidence of petitioner's violent and abusive childhood. If this evidence had been offered at trial, it is likely that jurors would have concluded that petitioner witnessed his father and stepfather viciously beat his mother; that both men also beat and abused him; and that petitioner's father molested him. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990). Thus, it is reasonable to expect that some jurors would have found this evidence especially important in understanding a defendant who had acted violently toward women. Considering the weak mitigation case put on, the prosecutor's focus on the lack of evidence of mental illness, and the strength of the evidence of abuse presented here, the court finds a reasonable probability that had counsel properly investigated and presented evidence of abuse, the result of the penalty phase would have

> been different. The court will recommend granting the petition for writ of habeas corpus on this basis.

[3] Karis claims that counsel failed to investigate and present significant mitigating evidence of his childhood poverty, abuse, and the family dynamics. Karis' attorney had a duty to conduct reasonable investigation, including an investigation of Karis' background, for possible mitigating evidence. Indeed, a substantial mitigating case may be impossible to construct without a life-history investigation. G. Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U. L. Rev. 299, 321 (May 1983). The supreme court has recognized the importance of informing the jury about the background and character of the defendant in a capital case.

> The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence.

Penry v. Lynaugh, 492 U.S. 302, 319 (1988) (citations omitted).

[4] The issue for the jury was whether Karis would live or die. We have emphasized the importance of presenting the available mitigating evidence in order for the jury to fairly make the vital determination of whether the defendant will live

or die. We have noted that the failure to present important mitigating evidence in the penalty phase can be as devastating as a failure to present proof of innocence in the guilt phase. *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992). The Supreme Court has also recognized the importance of the use of a defendant's background as mitigation evidence:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Boyde v. California, 494 U.S. 370, 38 (1990). The Supreme Court recently held that an attorney's failure to conduct an investigation that would have uncovered "extensive records graphically describing [the petitioner's] nightmarish childhood" constituted deficient performance. *Williams v. Taylor*, 529 U.S. 362, 363 (2000). As the Court explained, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398.

[5] Karis' counsel presented mitigation evidence for only 48 minutes. In that short time, counsel called witnesses, eliciting that Karis had exhibited artistic and academic talent, that his mother had been divorced and that he had saved his

brother from drowning when he was a child. While defense counsel offered this meager presentation, the district court findings are replete with evidence of abuse that should have been uncovered and presented by counsel upon any reasonable investigation and representation. Counsel's failure to present such substantial mitigating evidence was woefully inadequate and kept crucial information from the jury faced with sentencing Karis to life or death.

Penalty phase counsel acknowledged that evidence of abuse of Karis and of his mother when Karis was a child was relevant to the penalty phase case. Until a week prior to the penalty hearing Karis' counsel apparently intended to give the jury information on such abuse through the testimony and report of Dr. Albert Globus. Karis' guilt phase counsel hired Dr. Globus to evaluate Karis' mental status. Dr. Globus interviewed Karis' mother, Mrs. Jones, who told him that Karis' stepfather constantly beat her up and mistreated and beat Karis in order to get at her. Mrs. Jones stated that Karis' stepfather gave him little attention other than this abuse or when Karis did something wrong.

Dr. Globus reported that Karis "no doubt experienced brutal abuse from his stepfather without sufficient cause and often as a result of his stepfather's anger at his mother." Dr. Globus described Karis' parental environment as "characterized by violence directed at his mother and himself" and that Karis' father and stepfather's abusive attitude toward his mother set the scene for the development of an acceptance of violence as the

solution to social and interpersonal problems and a low opinion of women. Dr. Globus depicted Karis' stepfather as "brutal towards him and his mother," explaining that Karis was subjected to seeing his mother mistreated and being aware of some sexual abuse as well.

[6] Penalty phase counsel decided not to call Dr. Globus to testify at the penalty hearing because there was also damaging evidence in his report. We agree with the district court's conclusion that the decision not to use Dr. Globus to establish this childhood abuse was a tactical decision that did not violate *Strickland*. *See* 466 U.S. at 690. However, counsel was admittedly on notice from Dr. Globus' report of substantial family abuse. Despite his conceded knowledge of this history, counsel failed to present any evidence of Karis' family abuse to the jury. Counsel maintains that he did not ask Karis' mother questions about this abuse at the penalty hearing because he did not know what she would say and that she had denied the abuse. She contends, however, that he never asked her and that if he had, she would have testified about it. Even taking counsel's statement as true, his failure to investigate the abuse through other family members and witnesses was error of constitutional magnitude. *See Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998) (concluding that counsel was deficient for failing to "perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface"). Counsel or his investigator spoke to only three of Karis' family members: his mother, his brother who had suffered brain damage, and his aunt.

[7] The State argues that counsel had no duty to investigate this matter further because Karis and his mother were uncooperative. Counsel himself stated that "uncooperative" was probably an inaccurate word, rather that "[f]or whatever reason, they did not want to tell me the full extent of Mrs. Jones' prior life." The fact that they did not offer this information regarding the abuse did not excuse counsel from further investigation of such substantial mitigating evidence. This is particularly true where, as here, counsel was aware of the childhood abuse and there was essentially no other significant mitigating evidence to present to the jury.

> [C]ounsel's duty to investigate mitigating evidence is neither entirely removed nor substantially alleviated by his client's direction not to call particular witnesses to the stand. Furthermore, a lawyer who abandons investigation into mitigating evidence in a capital case at the direction of his client must at least have adequately informed his client of the potential consequences of that decision and must be assured that his client has made "informed and knowing" judgment.

Silva v. Woodward, 279 F.3d 825, 838 (9th Cir. 2002). In this case counsel was not instructed not to call his mother or to ask her about the abuse. Certainly he should have explained to her the gravity to her son in not testifying about the abuse. Even if she had denied it initially, which she disputes, he knew from Dr. Globus that it had occurred.

At the evidentiary hearing before the district court, Karis presented his mother's testimony about James Karis Sr.'s abuse of her and Karis. She gave numerous examples of the violent abuse that occurred:

> Jim became obsessed with controlling me. He used to say to me, "I want to know every place you go and who you go with. I want to know exactly when you get off work, and where you go when you get off. I even want to know when you go to the bathroom." . . . Jim told me that if he ever saw me smoking a cigarette, he'd "knock it clear down [my] throat." Once, I was so sick of his rules that I decided to do it anyway, and I took one of his Camels and started to light it up right in front of him. I had not even lit the cigarette before Jim grabbed it from me. He then made me swallow it whole, just like he had promised. I gagged and coughed but did not dare oppose him.
>
> Jim was physically abusive towards me for years. I lived in fear of Jim throughout our marriage, and for several years after our divorce as well. He threatened to kill me and I knew he not only could but would if I crossed him. He had an unpredictable temper, and when I said something that angered him, he turned and slapped me with the back of his hand. When he was mad, Jim hit me and knocked me around the room, throwing me from wall to wall as if I were a ball on a pool table.

She described how she would beg him to stop beating her but he was beyond reason once he started. She stated that Jimmy was present during almost all of these fights. She further stated:

> I filed for divorce from Jim in October, 1953, and our divorce became final in November 1954, when Jimmy was three years old. Even then, however, Jim was not out of my life, for almost two years after we separated, Jim threatened and intimidated me. He begged me to take him back. He parked his car outside my apartment and stared at my window for hours. He started following me to and from work, and leaving "reminders" to let me know he was watching me . . . .
>
> Jim also continued to beat me after our separation. We had loud, awful fights, and Jimmy was often there during them. I remember one time when Jim threatened to take Jimmy from me and never let me see him again, and I had to pull little Jimmy, crying, from Jim's arms.
>
> Jimmy continued to see his father for regular visits, almost every single weekend, after our divorce. Jimmy's behavior seemed strange after these visits with his Dad. When he was just two or three years old, Jimmy began to call me curse names that he was too young to understand himself. I will always believe that Jimmy's daddy trained Jimmy to call me

> those slurs. After almost every visit with his father, Jimmy had some kind of injury-bruises on his legs, or something else that "hurt" him. Once, at age four, Jimmy came back from seeing his father with a circle-shaped burn on his hand. Jim told me that it was caused by his girlfriend, who had accidentally burned Jimmy with a car cigarette lighter.

She reported that she remarried when Karis was around five years old and that that husband, Courtney Jones, also beat her up all the time and that they were caught up in an "exhausting cycle of violence." She described the first time he beat her up when she could not quiet their crying baby: "Courtney jumped out of bed, grabbed me, threw me on the floor. Then he sat on top of me, pinned me down, and hit me all over with his hands and fists." She further stated:

> Courtney had a particular style of beating me. The most common thing he did was hold me close to him — either by grabbing my clothes or pinning me against a wall — and punch me over and over. He also kicked me, threw me down, and threatened to kill me. One threat Courtney used before he lit into me was, "I'll make you wish you were dead." Lots of times, he made me feel so powerless and afraid that I did want to die.

She testified that like Jimmy's father, Courtney was "insanely jealous."

> Courtney followed me when I left the house, and told me when, where, and with whom I could go out. When I worked nights at a fast-food restaurant, Courtney often put the boys in the car, drove to the restaurant, and parked outside for hours while he watched me. One night, I got so sick of Courtney's rules that I decided to do something I knew would make him furious. I left the kids at home and went down to San Jose with a cousin of mine whom he despised . . . . When I got to our house, Courtney was in the bedroom with Kevin and Jimmy. He came out of the room and beat the living daylights out of me. He dragged me from room to room, punching me and throwing me against the walls. When we got to the kitchen, he threw me on the floor, picked up a trash can full of garbage, and dumped it all over me. When I lay there, he yelled, "Now take your damn kids and get out of my house!" For days afterwards, I had bruises all over my body, two black eyes, and I could hardly walk for a week.

She further stated that he would go after Jimmy to get at her and that if she told Courtney to stop calling Jimmy names or whipping him, it just made things worse. She recounted how Courtney favored his own son and berated Karis:

> Courtney adored Kevin. He treated him like a king, doting on him and spoiling him. But Jimmy never got any of Courtney's love. Courtney never treated

> Jimmy like a son, and called him "you little wop" more often than he called him by his name. . . . If Jimmy and Kevin were happily playing together, Courtney would step in, take Jimmy away, and make him sit still against a wall to watch while Kevin played with all the toys himself. . . . Lots of times he came home from work, picked up Kevin, and asked him, "Did your Mama whip you today?" and "What did that little wop get away with today?" . . . . Jimmy was scared to death of Courtney because of all the beatings, whippings, and threats.

She alleged extreme cruelty as grounds for divorcing him. She divorced him in March of 1961 when Jimmy was around nine years old.

Dr. Douglas Liebert's declaration reveals that several family members knew of Courtney's abuse. The district court record contains numerous declarations from her and others about this abuse yet Karis' lawyer presented none of this powerful and potentially life-saving evidence at sentencing. The opinion of the district court identified some of this evidence.

> Petitioner has presented substantial testimony that James Sr. emotionally and physically abused Marie. Marlene Younger, Mrs. Jones' sister-in-law, knew that James Sr. treated Marie badly. She also testified that she cared for petitioner often when he was

> young. She noted that after visits with his father, petitioner "seemed different: he was hard to control, easily upset, and cried a lot for no apparent reason." Dona Williams, Mrs. Jones' sister, testified that she heard from her mother that James Sr. "was always beating Marie up." Tom Karis, James Sr.'s brother, recalled that "Jim was violent with Marie, and I saw her with black eyes and bruises many times." (transcript references deleted).

Mrs. Jones testified that counsel did not ask her about abuse and that if asked she would have testified of the abuse at the penalty hearing. Marlene Younger, Karis' aunt also stated that she would have testified about Courtney Jones' abuse of Mrs. Jones if counsel had asked her about it. We are not persuaded by the State's argument that this performance was constitutionally sufficient under 1982 standards of practice.[10/]

It is difficult to imagine what kind of standard the State conceives would allow counsel to rely almost solely on testi- mony that Karis was artistic and had academic potential to present a mitigating case, while failing to present any evidence of such substantial abuse to the jury for consideration in making a life or death determination for Karis. The defense

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10. See evidence of the 1982 standard in footnote 9. Moreover, in its opening brief, the State itself cites to testimony of guilt phase counsel that in 1982 an attorney was expected to present mitigation in the form of childhood problems.

counsel's portrayal of Karis as intelligent without any indication of his violent and abusive childhood afforded the prosecution a very effective argument. The prosecutor emphasized the fact that Karis was "bright" and "cunning" and that he "well knew exactly what he was doing." The prosecutor further argued that Karis was not "so lacking in ability" that he was "warped into being a killer," rather he had all the ability, "but he changed his life into that of visiting evil destruction and death."

[8] As the district court found, counsel could have offered "substantial and wrenching evidence" of Karis' violent and abusive childhood. This information of Karis witnessing his father and his stepfather viciously beat his mother, in addition to both men beating and abusing Karis, is extremely probative as mitigating evidence. Evidence of severe beatings that Karis' mother received from his stepfather, Jones, during the time that Karis was older and more inclined to have vivid recollection, would be highly relevant to mitigation as potentially having a serious effect on a child's attitude and treatment of women as he grew up. It should at least have been presented by the mother and others who could verify it for a jury to consider, even without Dr. Globus's elaboration on the effect it would have on a developing child.

[9] The testimony before the district court was of severe beatings and treatment that could legitimately have severe effects on a young child's development and attitude. Based on the abundance of testimony at the evidentiary hearing regarding this abuse, the district court found that Karis' counsel

had the opportunity to show that Karis grew up "seeing his mother regularly and violently abused by men." We agree with the district court that such evidence is particularly compelling mitigating evidence in a rape case.

2. Prejudice

As the district court found, "Petitioner's trial counsel has provided no rational justification for his failure to pursue an investigation into petitioner's history of family abuse." There was no strategic reason offered. The dissent believes the strategy was to end testimony with the mother crying on the stand. However, bringing out the abuse early in her examination would not have interfered with this strategy, in fact it would likely have enhanced it. How much more effective to have brought out the wrenching abuse she and Karis suffered and then leave the mother crying on the stand. A reasonable investigation and witness preparation would have made this possible.

The dissent further contends that the result reached by the majority in this case is precluded by *Burger v. Kemp*, 483 U.S. 776 (1987). In that case the attorney made a strategic decision not to call witnesses to testify about his troubled family background because it would inevitably reveal his criminal juvenile background and his hair trigger violent temper, both of which the jury had no knowledge. This was "at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as a result of [a co-defendant's] strong influence upon his will." *Id.* at 793. *Burger* has been distinguished in a

number of cases in our circuit on the basis of this reasonable strategic choice, most recently by *Silva*, 279 F.3d at 844.

In Karis' case, as the district court found, there was no risk of putting on evidence of the wrenching abuse of Karis and his mother. It was within the range of reasonable tactics not to put Dr. Globus on the stand, but that does not excuse the failure to present the evidence of abuse through other witnesses. When the decision was made, shortly before trial, not to call Dr. Globus, the lack of thorough investigation left Karis' attorney unprepared to present what he had intended to be his major mitigating evidence. As he put it, he intended to make James Karis, Sr. and Courtney Jones the "heavies." Thus, as the district court found, "After deciding not to put on Dr. Globus, petitioner's counsel was left with little of consequence to present in mitigation. The only mitigating evidence concerned petitioner's artistic ability, his intelligence, and some limited testimony concerning his youth."

The dissent notes that the prosecutor asked no questions of the mitigation witnesses. This is no wonder, in that the prosecutor no doubt believed the testimony was of little consequence, and more importantly, it played right into his hands in the final argument he intended to make, and did make. The district court quoted a pertinent portion in its opinion:

> [W]e see Mr. Karis, not as an impoverished individual, not somebody who was void of talents, who's devoid of intellectual capacity, not somebody who,

> by virtue of being so poor as an individual, so lacking in ability was warped into being a killer. No, on the other hand, Mr. Karis has all of the ability, but he changed his life into that of visiting evil destruction and death on fellow human beings. . . . [D]espite Mr. Karis' abilities, despite his intellectual capacity, despite all of his talents, he has turned to base and immoral purposes. He grows marijuana for profit. He rapes for pleasure, and he kills to avoid apprehension.

[10] Counsel's error in failing to investigate and present the highly relevant information of an abusive childhood, was prejudicial. A "reasonable probability" exists that a jury would find this information important in understanding the root of Karis' criminal behavior and his culpability. The prosecutor repeatedly stressed the absence of any testimony of mitigation throughout the penalty phase argument. With proper investigation, Karis' counsel could have put before the jury evidence contrary to the prosecution's piercing argument.

It is noteworthy that even with the weak mitigation evidence that was presented, the jury was out for three days before rendering its verdict. If evidence of Karis' violent and abusive childhood had been offered it is very likely that some jurors would have found such evidence particularly important in order to understand why he acted so violently towards women. As we have noted, there is a belief, "long held by this society, that defendants who commit criminal acts that are

attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde*, 494 U.S. at 382.

[11] Based on the weak mitigation case presented, the prosecutor's focus on the lack of mitigating evidence, and the substantial evidence of abuse presented to the district court, a reasonable probability exists that had counsel properly investigated and presented evidence of abuse, the result would have been different. In its opening brief on this appeal, the State reports that guilt phase counsel recalled Karis and his mother crying at the penalty phase and that he felt it was genuine, that the jury reacted to it, and that he thought it a particularly compelling moment. This further suggests the significant relevance that substantial evidence of violent childhood abuse would probably have had on the jury's decision of whether Karis should live or die. In light of the whole record, and despite the substantial evidence of aggravation, the failure of counsel to present mitigating evidence made the sentencing neither fair nor reliable. *See Hendricks*, 70 F.3d at 1044 (citing *Lockhart v. Fretwell*, 506 U.S. 364, 368-70).[11/]

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11. Because our decision entitles Karis to a new sentencing hearing, we do not address his other claims of error at the penalty phase with the exception of his constitutional challenge of California's sentencing scheme. With regard to this claim, we reject Karis' argument that the scheme does not adequately narrow the class of persons eligible for the death penalty. The California statute satisfies the narrowing

CONCLUSION

[12] We affirm the judgment of the district court granting the petition as to the penalty phase of the trial as modified herein and denying relief as to the remainder of the claims. We remand the case to the district court with instructions to grant the petition for a writ of habeas corpus unless the State within a reasonable period of time either corrects the Constitutional error in Karis' death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

AFFIRMED and REMANDED.

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requirement set forth in *Zant v. Stephens*, 462 U.S. 862 (1983). The special circumstances in California apply to a subclass of defendants convicted of murder and are not unconstitutionally vague. *See id.* at 972. The selection requirement is also satisfied by an individualized determination on the basis of the character of the individual and the circumstances of the crime. *See id.* California has identified a subclass of defendants deserving of death and by doing so, it has "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Arave v. Creech*, 507 U.S. 463, 476 (1993).

KLEINFELD, Circuit Judge, concurring in part and dissenting in part:

I concur in part I of the majority opinion, as to the guilt phase of the trial, but respectfully dissent as to part II, regarding the penalty phase. We should reverse the district court's grant of the habeas petition. The jury sentenced this man to death because of his horrible crimes, not because he had a bad lawyer. The majority opinion mistakenly treats counsel's failure to put on evidence of an abusive childhood as per se ineffective assistance, without the deference to defense counsel's judgments required by *Strickland v. Washington*.[1]

I. Ineffective Assistance

Like the majority, I am troubled by the brevity of the penalty phase defense. Sometimes a defense is brief because counsel is not prepared. But in this case counsel thoroughly investigated and prepared. The problem was that the investigation turned up little evidence. The shortage of mitigating evidence was because Karis was a very bad man.

The majority opinion makes two central propositions: (1) "failure to investigate the abuse through other family members and witnesses was error of constitutional magnitude,"[2]

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1. 466 U.S. 668 (1983).

2. Maj. Op. at 4356.

and (2) "failing to investigate and present the highly relevant information of an abusive childhood [ ] was prejudicial."[3/] These propositions are erroneous, because *Strickland* allows for no such absolutes. To show "deficient performance" under *Strickland*, a petitioner must show "that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment,"[4/] and our scrutiny of counsel's conduct must be "highly deferential," evaluating it "from counsel's perspective at the time."[5/]

The majorjty opinion concedes that "there was essentially no other significant mitigating evidence to present to the jury" except for evidence that Karis and his mother had both been abused during his childhood.[6/] The problem in the majority's analysis arises because counsel investigated and discovered the abuse, but was precluded both by tactical considerations and by lack of cooperation from his witnesses from presenting it.

Karis committed the murder in this case twenty years ago and has litigated continually since then. This decades-long duration is typical of death penalty cases. The *Strickland* test,

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3. *Id.* at 4364-65.

4. *Strickland*, 466 U.S. at 687.

5. *Id.* at 689.

6. Majority at 4357.

whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[7] is emphatically not a question of whether during the decades following the trial any other lawyer or expert can come up with something new that might have helped the defense. We must view the facts "as of the time of counsel's conduct."[8]

The Supreme Court applied the general principles of *Strickland* in *Burger v. Kemp*[9] to facts that preclude the result in the case at bar. In *Burger*, defense counsel "offered no mitigating evidence at all,"[10] and put no witnesses on the stand,[11] while in the case at bar, mitigating evidence was presented through several witnesses. There was mitigating evidence that counsel could have presented in *Burger*, that "would have disclosed that petitioner had an exceptionally unhappy and unstable childhood."[12] In our case, it is considerably less clear, as I will explain below, that counsel could have presented more evidence to that effect. The lawyer

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7. *Strickland*, 466 U.S. at 687.

8. *Id.* at 690.

9. 483 U.S. 776 (1987).

10. *Id.* at 788.

11. *Id.* at 791.

12. *Id.* at 789.

in *Burger*, as here, "was aware of some, but not all, of this family history."[13] In *Burger*, as here, counsel talked with the petitioner's mother, though she claimed after the trial was over that his efforts were minimal.[14] He also talked with a lawyer who had befriended the petitioner and a psychologist.[15] The problem with the defense psychologist in Burger was that he concluded that petitioner's "psychopathology would make him want to do wrong,"[16] just as the problem with the defense psychiatrist, Dr. Globus, in our case was that he had very little good to say about Karis. The Court concluded in Burger that defense counsel's decision not to put anyone on the witness stand "may have been erroneous" but was "not unreasonable."[17] Though the Court in *Burger* concluded that defense counsel "could well have made a more thorough investigation,"[18] the decision to interview no further witnesses was not a constitutionally deficient judgment.[19] Despite the majority's conclusion that Burger's lawyer acted more strategically than Karis's, there is simply no way to avoid the force of Burger in

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13. 483 U.S. at 790.

14. *Id.*

15. *Id.* at 790-91.

16. *Id.* at 791 n. 9.

17. 483 U.S. at 792-93.

18. *Id.* at 794.

19. *Id.* at 794-95.

this case.

Defense counsel was faced with a hard case to defend, and a hard defendant for whom to get sympathy. At the penalty phase of Karis's trial, the prosecution established Karis's previous rapes through the testimony of prior victims. He and another man had raped a woman in 1971, and he went to prison until 1975. Out of prison three months, he raped a high school girl, and went to prison for another five years. While still on parole for that recent rape, he raped one of the women in the case at bar. Instead of taking the lesson from his imprisonments that he should not commit rapes, he took the lesson that he should not leave witnesses alive. After he captured the two women in this case and raped one of them, he coldly shot them both to keep them from ever testifying against him.

Most of the possible defense witnesses posed problems. Karis's mother had lied for him twice to the police, so cross examination was threatening. The defense psychiatrist, Dr. Globus, reported to defense counsel that Karis was "involved" in the murder of another inmate, had "a very degrading opinion of the value of women," and had "a strong urge to destroy."

As for the abusive family environment — the hook that the majority opines might have gotten Karis enough sympathy to turn the jury in his favor — it did not, in Dr. Globus's report, sound likely to arouse much jury sympathy for this woman-hating repeat rapist and murderer. (It sounds like

a great deal more in the evidentiary hearing testimony, composed decades after trial, that the majority cites at great length). Karis's mother, though crying the whole time, told Dr. Globus that Karis did quite well in school until he started cutting classes in junior high. She and his natural father divorced when he was two, and he never saw his natural father again until he was sixteen. Karis himself told the psychiatrist that "he now thinks she should have supplied more discipline" when he was growing up. His complaint about her marriage that lasted for four years to his stepfather, from when he was nine, was "that the only time he received any attention was when he did something wrong and then he was usually beaten." His stepfather beat his mother and beat Karis with a belt, often with the buckle end. Karis did not report any recollection to the psychiatrist of any beatings by his natural father of his mother or himself.

Defense counsel in this case, unlike in *Burger*, put on a case, as substantial as he could, during the penalty phase. First he put on a prison official who testified about Karis's above average performance in the prison arts and crafts program, showing some potential for rehabilitation. Then he put on a woman who owned a craft shop, who testified that Karis had sold her items which she resold in her shop, demonstrating further Karis's ability to do something decent and useful. Another prison official testified to Karis's excellent crafts, and also to his constructive contribution to prison life as a guitar player. Then he put in by stipulation Karis's records from his college education, further showing rehabilitation

potential. An instructor at the college testified to Karis's fine work in his geography class. He put on a stipulation that Karis's seventh grade teacher and counselor characterized him as a "very bright and sensitive child."

Then came Karis's mother, a triumph for the defense. Through her, the defense put into evidence photographs of "Jim" as a little boy and school report cards. She testified that she divorced Karis's father when he was about two, and he did not see him again until he was almost sixteen. Then defense counsel elicited that when Karis's little brother was five, he almost drowned at the ocean, and the mother "froze," but "Jim jumped in" and pulled him out as he was being "dragged under." She then began crying in front of the jury, and Karis began crying, too. She was excused without the prosecutor cross-examining her. Defense counsel could have asked for a recess until she stopped crying, and then examined her about the abuse of her and Karis, which he knew about from Dr. Globus's report. But he had good reasons not to: (1) he had reason to think, as I explain below, that she would give unhelpful answers; (2) he would lose the wonderful dramatic ending of her and her son crying as they recalled his lifesaving heroics; and (3) the prosecutor might be moved to cross-examine, showing that she had lied for Karis on two separate occasions to the police. Instead of taking that risk, he moved on to Karis's aunt, who testified about how upsetting it was to the boy when her husband, his uncle, who used to do a lot with the boy (talking, motorcycle riding, fishing, camping) died in a truck crash. The majority takes issue with this strategy, and says that

the lawyer should have asked Karis's mother about the abuse before she started crying; he probably didn't know when she was going to start crying, and he couldn't count on her to say helpful things about the abuse.

This defense case could have taken a couple of days, had it stretched through lengthy cross examination, redirect, recross, redirect, and so forth until both sides brought out all they had and probed all the other side had brought out. But the prosecutor employed a clever tactic to deflate the defense case and shorten it. He made no objections. After each witness testified, he said "no questions." That prosecution tactic made the defense case for mitigation go very fast indeed and robbed it of the force it would have had, had cross examination stretched it out, by implying that it was so insubstantial as not to need challenge.

Thus, defense counsel investigated, prepared, and presented a case with six witnesses and one other by stipulated testimony, as well as exhibits. The majority concedes, as it must, that Dr. Globus's harmful opinion, despite his being hired by the defense, made it reasonable not to present his testimony. Defense counsel had consulted two other doctors as well, without getting anything useful. The majority says that what defense counsel did wrong was that he failed to present evidence that when Karis was a child, his natural father and his stepfather viciously beat his mother, and also beat Karis. The majority says that defense counsel should have presented evidence of abuse "through other family members and

witnesses."[20]

Defense counsel had initially planned to put on proof of the abuse. The reason defense counsel had not talked to the father and stepfather was that he had planned to "make them out to be the heavies" and did not want them to contact the prosecutor with his plans and undermine the only evidence he had. But when defense counsel asked Karis's mother about the abuse, "she denied . . . telling Dr. Globus what Dr. Globus had written in the report." She was at that time "good friends" with the stepfather and counsel feared that she would protect him. Failing to ask her about the abuse on the stand, or to bring it out from someone with less knowledge than her, might have denied Karis mitigating evidence, or it might have avoided a worse situation in which the mother would destroy defense counsel's credibility with the jury by denying that it had occurred because she wanted to preserve her relationship with the stepfather. And he could not even count on his own client to back him up. Karis told defense counsel he did not want defense counsel to ask his mother about the beatings. The majority quotes extensively from what the mother and others said years later, in the evidentiary hearing, while Karis was on death row. The evidentiary hearing took place long after the mother's relationship with the stepfather may have evaporated. Counsel had sensible tactical reasons for not doing more with the abuse when the case was tried and Karis's mother was still "good friends" with the abusive stepfather.

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20. Maj. Op. at 4356.

Williams v. Taylor[21] does not control, because in that case, the lawyer did not look into the defendant's background at all, never found out about the defendant's juvenile records which contained ample evidence of abuse, and admitted in closing argument that it was difficult "to find a reason why the jury should spare [his] life."[22] In this case, defense counsel made "a reasonable investigation such that [he was] able to make informed decisions about how best to represent [his] client[ ],"[23] and "made a showing of strategic reasons for failing to" intro- duce the evidence.[24]

II. Prejudice

Strickland also requires that the petitioner "affirmatively prove prejudice."[25] "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."[26] Rather, Karis must show that there was a "reasonable probability that, but for counsel's

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21. 529 U.S. 362 (2000).

22. *Id.* at 369.

23. *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999).

24. *Id.*

25. 466 U.S. at 693.

26. *Id.*

unprofessional errors, the result of the proceeding would have been different."[27] A reasonable probability is one that "undermine[s] confidence" in the jury's decision.[28] In the case at bar, all we have is a "conceivable" possibility that *Strickland* says is not enough, not a "reasonable probability" such that confidence in the jury's decision is undermined.

Maybe the jury would have felt very sorry for Karis had it learned about the child abuse, and maybe the mother would have changed her story again and admitted it, had counsel asked her while she was on the stand, even though she had denied it when he prepared her to testify. Or maybe she would have denied it, and ruined the humanizing testimony counsel had put on, with the chorus of crying about Karis saving his brother's life. And maybe the jury would have thought that a baby who did not remember his mother being beaten before he was two would not have been so traumatized as to mitigate murder. Maybe the jury would have found mitigation for a man who had suffered beatings with a belt for four years of his childhood. Or maybe some jurors would have said "I was beaten with a belt and I haven't killed anyone," and learned as the issue was explored that Karis had told Dr. Globus that he thought his mother had not disciplined him enough. The mitigation is speculative at best, especially in light of Karis's merciless multiple rapes and cold blooded murder to avoid

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27. *Id.* at 694.

28. *Id.*

apprehension.

In any case, it is possible to wonder whether "if only counsel had done something different," the result would have been different. But neither that kind of wondering, nor the evidence that can be developed in the decades following trial, is enough to show prejudice.

III. Conclusion

Karis has not presented any evidence that errors by counsel, if they were errors at all, were so grave "that it is as though he had no lawyer at all in the Sixth Amendment sense."[29] Nor has he demonstrated prejudice from failure to prove abuse of his mother and himself. Though a jury in this case, as in any case, could have gone the other way, it was not counsel's fault that it did not. The law and the facts preclude relief on the basis of ineffective assistance of counsel.

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29. *Caro*, 165 F.3d at 1234 (Kleinfeld, I., dissenting).

APPENDIX B

FILED
AUG - 3 1998
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES LESLIE KARIS,

Petitioner,

v.

ARTHUR CALDERON, et al.

Respondents.

_____/

NO. CIV. S-89-527
LKK/JFM

DEATH PENALTY CASE
ORDER

James Leslie Karis, a state prisoner under sentence of death, filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On May 29, 1997, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within thirty days. After a series of extensions granted by this court, both parties have filed their objections and further briefing.

Because federal habeas proceedings are civil in nature[1/], the power of the district court to refer matters for

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1. Although Petitioner was convicted in state court through criminal proceedings, it has long been established that

review by a magistrate judge is quite broad. Thus, a district court judge may designate a magistrate judge to hear and determine any non- dispositive pretrial matters brought by a person seeking habeas relief, see 28 U.S.C. § 636(b)(1)(A), Local Rule 302(c)(17), and may refer dispositive motions for Findings and Recommendations. 28 U.S.C. § 636(b)(1)(B); Local Rule 302 (a) & (c)(17). The standard employed by the district court in reviewing decisions of the magistrate judge depends upon the character of the underlying decision.

Non-dispositive pre-trial motions referred to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) are reviewed under a clearly erroneous or contrary to law standard. See 28 U.S.C. § 636(b)(1)(A); Local Rule 303(f); United States v. Raddatz, 447 U.S. 667, 673 (1980). On the other hand, a magistrate judge's determination concerning matters referred pursuant to 28 U.S.C. § 636(b) (1) (B) are for the most part reviewed *de nova*. Thus, the district court reviews *de nova* those portions of the proposed findings of fact to which objection has been made, 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982), and the magistrate judge's conclusions of law. Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir. 1989) (citing Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983)). The court may, however, assume the correctness of that portion of the proposed findings of fact to which no objection has been made and decide the motion on applicable law. See United States v. Remsinci, 874 F.2d 614, 617 (9th Cir. 1989) (citing Orand v. United States, 602 F.2d 207, 208 (9th

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habeas proceedings in federal court are civil in nature. Browder v. Director, Dep't. of Corrections of Illinois, 434 U.S. 257, 269 (1978) (citing Fisher v. Baker, 203 U.S. 174, 181 (1906)).

Cir. 1979)).[2]

The court is not bound to adopt the magistrate judge's Findings and Recommendations; on the contrary, the court must exercise "sound judicial discretion" in making its own determination on the record. United States v. Raddatz, 447 U.S. at 675-76. The court may accept, reject, or modify, in whole or in part, the magistrate's findings or recommendations. 28 U.S.C. § 636(b)(1)(C); United States v. Remsing, 874 F.2d at 617.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed May 29, 1997, are ADOPTED IN FULL;

2. Petitioner's application for a writ of habeas corpus is GRANTED as to the penalty phase of the trial on the basis of claim 17;

3. Petitioner's application for a writ of habeas corpus is DENIED in all other respects; and

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2. The failure of a party to file objections does not relieve the district court of its obligation to review conclusions of law *de novo*. See Barilla v. Ervine, 886 F.2d 1514, 1518 (9th Cir. 1989).

4. Petitioner shall be resentenced to life in prison without the possibility of parole or a new trial on the penalty phase shall be commenced within sixty (60) days.

IT IS SO ORDERED.

DATED: August 3, 1998.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

APPENDIX C

FILED
MAY - 29 1997
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES LESLIE KARIS,

Petitioner,

v.

ARTHUR CALDERON, et al.

Respondents.

_____/

NO. CIV. S-89-527 LKK/JFM

DEATH PENALTY CASE

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner under sentence of death. He seeks relief pursuant to 28 U.S.C. § 2254. After consideration of the pleadings, briefs, and arguments of counsel, after careful review of the state court record, and in light of the facts presented at the evidentiary heating and by expansion of the record under Rule 7, the court makes the following findings and recommendations.

OVERVIEW OF FACTS[1/]

I. Guilt Phase Facts

A. Prosecution Case

On July 8, 1981, Ms. P and Ms. V were taking a brief walk during their midmorning break from their jobs at the El Dorado County Welfare Department in Placerville. About 10:30 a.m., as they were walking under an overpass, a man ordered the women at gunpoint into his car. They complied, entering the back seat. The man drove some distance out of town, drove off the road, stopped the car, and ordered the women to walk down a dirt path to a creek bed. They followed the creek bed to an area where the man ordered the women to disrobe.

Ms. P's hands were tied and she was gagged. The man raped Ms. V. He then ordered the women to continue walking down the creek bed. When they reached a large hole, the man ordered both women to get into the hole. In reply to Ms. V's plea that she not be killed, the man stated that he had to kill them so that he would not be killed.

The women turned away from the man. Ms. V then

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1. Except where otherwise indicated, the factual background is taken from the California Supreme Court's findings of fact which are presumed correct. See 28 U.S.C.§ 2254(d)(8).

heard five shots. She felt a numbness in her neck after the second shot and felt the impact of a second bullet in her neck with the fourth shot. She feigned death. She then heard the man throwing rocks on Ms. P and on her own head. After hearing the man leave, Ms. V waited five to ten minutes before she made her way back down the creek bed and out to the road. She flagged down a gravel truck driver who took her out to the highway. The truck driver flagged down a car to take Ms. V to Chili Bar where the sheriff and medical help were summoned.

The truck driver remained near the highway to guide emergency personnel. Ms. V had described Ms. P's location to the truck driver. Shortly thereafter, a paramedic examined Ms. P and determined that she was dead. A subsequent examination established that the cause of death was one of three bullet wounds and a fracture through the base of her skull.

Ms. V was taken to a local hospital and later transferred to the Sacramento Medical Center. The truck driver testified that Ms. V described her assailant as a Mexican man with long dark hair and a green car. RT 1570:25 - 1571:3 and 1584:1-3. According to an officer at Chili Bar, Ms. V described her assailant as "a male Mexican, 5'8" to 5'10", heavy build, with a mustache, and at least a one-day-old beard." She also told him that her assailant drove a "ratty old big car, green in color, two-door." RT 2015:20. The officer who accompanied Ms. V in the ambulance from Chili Bar to the local hospital testified that she described her assailant "as having dark, shoulder-length hair, medium-dark mustache, five foot eight to

ten inches tall, wearing a white T-shirt, blue jeans, and possibly of Mexican descent." RT 2011:20-23. The officer who interviewed Ms. V in the hospital emergency room testified that she gave a similar description of her assailant and his car. RT 2017:1-2, 7.

Ms. V testified that one or two days after the shooting she told a police detective that her assailant "was a little taller than I was, around five ten, and that he had shoulder length hair, maybe a little bit longer, and that it was dark hair, black hair, and it was curly or wavy, and that he had a mustache that was like a Fu Manchu style, and he hadn't shaved for a couple days. And that I didn't know his nationality, could be Mexican, and then I said it could be Indian, Italian, there is -- just dark-skinned, he had dark hair." RT 1538:23 - 1539:2; 1524:24 - 1525:12. On July 14, 1981, Ms. V, who was still in the hospital, picked a photograph of petitioner from a photo lineup. RT 1525-27, 1559.

Analysis of a stain on Ms. V's underwear indicated that seminal fluid was present. The stain was tested for phosphoglucomutase (PGM) enzyme type and for blood type. At trial, an expert called by the prosecution testified that PGM was a genetic marker found in body fluids and that the PGM enzyme type of the seminal fluid was the same as petitioner's. The same expert also testified that petitioner was a non-secretor, which meant that his AB blood type would not show up in other body fluids such as semen or saliva and that only Ms. V's blood type was found in the stain. According to this witness, 4% of

the population were non-secretors with petitioner's PGM type. On cross-examination the expert acknowledged that approximately one out of four persons in the population could have been the source of the seminal fluid. RT 1984. Ms. V's husband was ruled out as a source of the fluid.

Ms. V had initially described the car in which she had been abducted as an old, large car of American make, two-door, and green in color. At trial she testified that the car was an older, large, two-door car, which was two-tone and light green in color and had a dark interior and a vinyl top. RT 1493:27 - 1494:7; 1499:8; 1552:20-21.

Detective Southern testified that on the evening of July 8, Ms. V also told officers about objects in the car. RT 1665-66. At trial she testified that she had seen a black cool cushion and two rectangular pillows, one a dark color and the other a bright color. RT 1499:19-26. On July 9, officers impounded petitioner's car and removed three pillows from the back seat. RT 1954:24 - 1955:10. On July 10, Ms. V was shown the pillows and stated that they looked like the ones she had seen in the car. RT 1953:1; 1541:17-21.

On the evening of July 8, petitioner's brother Kevin Jones and Kevin's girlfriend Dana Skelton drove to the house petitioner shared with his mother and Kevin. Dana testified that after Kevin stopped to speak to a deputy sheriff who was parked at the foot of the driveway, he drove up to the house and spoke to his mother. He returned to the car and told Dana that he had

to take her home, and that they had to take petitioner with them in the trunk of the car because petitioner was dealing in cocaine. After they left the house with petitioner hidden in the trunk, petitioner joined Dana and Kevin in the passenger compartment of the car. Dana testified that petitioner had a moustache and a little bit of beard at that time. RT 1705: 16-17. They all drove to Dana's grandmother's home and spent the night there. The next morning Kevin promised Dana that he would drive her to work. He later told her he could not do so because his brother had to leave. The two men left ten minutes later.

Dana's grandmother described the man who had stayed at her home as having a fairly long moustache and dark hair. RT 1711:3-4. She identified a photo of petitioner.

Petitioner's neighbor David Marden testified that, on an afternoon that was determined to be July 8, 1981, he saw petitioner driving up to the house much faster than he had ever seen him drive before. RT 1715:6-16. Mr. Marden testified that petitioner was growing marijuana and that he believed petitioner left home out of fear of discovery.

On July 9, 1981 during the noon hour, petitioner arrived at the Rancho Cordova home of friends Peggy Steuben and Jay Raugust. Ms. Steuben testified that petitioner was quiet, withdrawn, and clean shaven. RT 1774:6-14. Petitioner asked Ms. Steuben if he could stay with them a couple days. She refused. Petitioner left around 7:30 p.m. that evening.

Ms. Steuben also testified that petitioner had visited Rancho Cordova on July 4, 1981. During that visit she and petitioner had a conversation about keeping a gun for self-defense. Petitioner told Ms. Steuben "[t]hat because of where he had been, in prison, that, you know, he would never want to go back there again and it was his self-defense to not leave a --you know, to eliminate anybody that could send him back there." RT 1770:28 - 1771:3. After Ms. Steuben said that it would be a particularly horrible thing to kill a rape victim, petitioner told her "It]hat he -- leaving a witness to testify, that -- that he had committed any certain crime or anybody else had committed any certain crime would be sending him back to prison, and it would be necessary to not leave a witness." RT 1771:26 - 1772:1; 2118:28 - 2119:12.

Prior to trial, Kevin Jones suffered a stroke. By stipulation that he was mentally and physically incompetent to testify, portions of his preliminary hearing testimony were read to the jury. Portions of Kevin's testimony differed significantly from portions of both petitioner's and Dana Skelton's trial testimony. Kevin testified that on the morning of July 8, 1981, he, petitioner, and their mother went to Placerville to cash a check at the Lucky Market, and went on to the post office to buy a money order. They drove back to their home between 9:30 and 10:00 a.m. Kevin testified that he and petitioner remained at home that day except for checking the mail and going out for beer. He stated that petitioner had shaved his moustache off a week before.

Kevin also testified that he had spent the night of July 8 with Dana Skelton. On July 9 he arrived home at about 8:00 a.m. and drove petitioner to the bus station about an hour later.

Kevin had been interviewed several times prior to trial. Officers testified about contradictory statements Kevin made. On the evening of July 9, 1981, he first told an officer that when he arose at 10 a.m. on July 8 petitioner and the car were gone. He also told officers that petitioner had a moustache on the morning of July 8, but shaved it off the following morning, telling Kevin to tell anyone who asked that he had shaved if off a week earlier. RT 1660-62.

On July 15, 1981 in Sonoma County, petitioner kidnapped two women and the five-month-old son of one of them. They had been playing tennis at a Fairfax park. As they returned to their van, petitioner ordered them inside at knife point and forced the owner of the van to drive northward. He told them he was wanted for murder, that he was a murderer, and that he had nothing to lose. One of the women attracted the attention of a gas station attendant while trying to escape. RT 1830:16-19; 1831:8-18; 1868:11-14, 25. Petitioner fled from the gas station to a mobile home park. He forced his way into a mobile home and demanded the owner's car keys at knifepoint. RT 1896:12 - 1897:20. He was apprehended outside the mobile home. RT 1899.

B. Defense Case

At trial petitioner testified that the family car was a 1975 silver Chevy Impala with a black naugahyde top. RT 2030:15-23. He identified the cool cushion, which was in evidence, as looking like the one his mother used in the car, RT 2085:23 - 2086:3, and identified the two pillows in evidence as being the ones that were in the car, RT 2086:17-20. He said he was cultivating marijuana for profit.[2/] When he visited Peggy Steuben on July 4, 1981 he had a full beard. On the Monday following the Fourth weekend, he shaved off his beard, leaving sidebums and a moustache. He also testified that on July 8, 1981, he had a tan. RT 2086:21-27.

Petitioner testified that on July 8, 1981, he arose at 7:30 a.m., shaved, and drove alone to Placerville where he cashed his unemployment check at the supermarket and purchased a $150.00 money order which he mailed to his landlord. He returned home by 10:15 a.m. and remained until 1:30 p.m. when he and Kevin drove to Georgetown to purchase beer. He and Kevin drank the beer at the Georgetown Springs and returned home about 3:30 p.m. Kevin left the house at about 6:30 p.m. that evening in the family car. After Kevin returned later that evening, petitioner left the house by hiding in

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2. Officers testified that when they impounded petitioner's car they also seized 50 to 60 marijuana plants found growing in buckets in the rear of a building across from petitioner's house.

the trunk of the car because he had seen the patrol car on the property. Petitioner assumed the patrol car was there because of marijuana he was cultivating. Since petitioner was on parole, he feared he would face a lengthy prison term if he was convicted for cultivating marijuana.

Petitioner testified that on July 9 he returned home. That morning he decided to leave home to visit some friends until he found out what was happening. Kevin drove petitioner to the bus station on the morning of July 9. He walked from the bus station to an on-ramp to Highway 50 and hitched a fide to Ms. Steuben's house. He had sideburns, a moustache, and hair below his collar at that time. That afternoon he telephoned home and Kevin told him the police were looking for him. He returned to the Steuben home, shaved his moustache, trimmed his sideburns, and cut his hair. He spent the next several days sleeping along the American River. On July 14 he saw a newspaper article saying that he was sought for murder. He hitched a ride to San Anselmo and then committed the kidnapping described by the owner of the van. He did not recall saying he was a murderer, but acknowledged that he told the women he was wanted for murder. He testified he did so to scare them into doing what he wanted.

The remainder of the defense case was devoted primarily to attempts to discredit Ms. V's identification testimony. Dr. Loftus, a psychologist, testified regarding the effects of stress on memory, photo biased identification, and the likelihood that a person who was confident in making an

identification was wrong. The officers to whom Ms. V described her assailant testified regarding her statement that he was Mexican or possibly Mexican, her description of the car as green, and her recall of petitioner's moustache, beard, and hair.

II. Penalty Phase Facts

A. Prosecution Case

At the penalty phase, the prosecution presented evidence of: (1) a 1971 rape, to which petitioner had pled guilty; (2) a 1975 rape, of which petitioner had been convicted; (3) the attempted rape in Sonoma County of one of the women in the van during petitioner's flight from the charged offense; (4) the fight with the owner of the van; and (5) the robbery of a woman's car keys during the same flight.

With regard to the 1971 rape, a woman testified that in 1971 she and two friends stopped to use a gas station restroom at about 12:30 a.m. Petitioner kidnapped them, and took them to an industrial area where he and a second man raped her. One of her friends also testified regarding this incident.

With regard to the 1975 rape, a woman testified that in 1975, when she was 17 years old, petitioner gave her a ride in his truck. He threatened her with a knife, drove to a remote location, and raped her.

The owner of the van testified that, during the July 15, 1981 abduction in Sonoma County, she heard petitioner tell the other woman in the van to remove her clothes. The van owner said she could not drive safely if nervous and asked petitioner to return to the front seat. He finally did so and told her that while he said he would not hurt them if they cooperated he had meant that he would not break bones or kill them, "but rape they could live with." The other woman in the van also testified about this incident. The van owner also testified about attempting to escape from the van when petitioner stopped to make a phone call at a service station. She said that petitioner grabbed her hair, flung her to the floor, and told her he was going to kill her.

The occupant of the mobile home to which petitioner ran from the gas station testified that petitioner pressed a knife to her stomach and demanded her car keys.

B. Defense Case

At the penalty phase, the director and assistant director of the art and handicraft programs at the California Medical Facility were called by the defense. They testified that petitioner's participation and work in the programs were above average. Petitioner had received awards for his work. The assistant director also had heard petitioner play the guitar well. A Placerville craft shop owner testified that craft items made by petitioner were of excellent quality and sold very well.

The instructor of a prison geography course testified that he awarded petitioner an "A." He had stated on the report card that petitioner had the best mind in the class and could easily do university level work.

It was stipulated that petitioner's seventh-grade teacher would testify that petitioner was a bright and sensitive child who appeared to be healthy.

Petitioner's mother, Eva Jones, testified that she still loved her son, that she was divorced from his father when he was two years old, that his father rarely saw him after that until he was a teenager, and that she remarried but was divorced again after four years. She also testified that petitioner saved Kevin from drowning when Kevin was five or six years old. Petitioner's aunt testified that petitioner often went camping, fishing, and motorcycle riding with her former husband, and became upset when the husband was killed in a truck crash.

PROCEDURAL BACKGROUND

I. State Proceedings

On July 15, 1982, a Sacramento County jury convicted petitioner of: (a) the first degree murder of Ms. P, with special circumstances of murder in the commission of kidnapping and in the immediate flight from rape; (b) the attempted murder of Ms. V; (c) the kidnapping of Ms. P and Ms. V; and (d) the rape of Ms. V. He was found to have

personally used a firearm in the commission of each offense and to have intentionally inflicted great bodily injury in the commission of the attempted murder and kidnapping offenses.

In the course of the trial, petitioner admitted a charge that he suffered a prior conviction for rape in 1976 in Santa Clara County and served a prison term for that offense. The court also found that petitioner pled guilty to rape in Orange County in 1971 and served a prison term. On July 29, 1982, the jury returned a death verdict for the murder. On September 17, 1982, the court imposed the judgment of death and sentenced petitioner to an aggregate term of 41 years for the other offenses and enhancement allegations.

In 1986, along with the direct appeal from the conviction, petitioner's appellate counsel filed a single issue petition for a writ of habeas corpus, challenging trial counsel's failure to move to exclude the testimony of petitioner's brother and of a police officer. Without holding an evidentiary hearing, the California Supreme Court affirmed the judgment and denied the petition. People v. Karis, 46 Cal. 3d 612 (1988), cert. denied, 490 U.S. 1012 (1989).

II. Federal Proceedings

After the United States Supreme Court denied a petition for a writ of certiorari, petitioner's appellate counsel withdrew from the case. In 1989, petitioner filed an application for appointment of counsel in this court. Counsel was appointed

in May that year. On March 26, 1990, petitioner filed a petition which contained a number of unexhausted claims. After some discovery, petitioner filed an amended petition adding further claims.

On September 4, 1990 the court held a hearing, attended by counsel for both parties and by the petitioner, to determine whether there were any claims not identified in the amended petition. Later in September, the parties agreed upon the identity of all unexhausted claims and these proceedings were stayed pending exhaustion of state remedies.

Petitioner filed a second state habeas corpus petition in July 1991. The California Supreme Court ordered informal briefing. Respondents argued that petitioner had failed to explain the delay in raising these claims. Petitioner then filed an amended petition which included a brief explanation of the proceedings in this court and added a claim not contained in the July petition. Without explanation, the California Supreme Court treated this amended petition as a new one. Respondents did not file an opposition to the amended petition.

In October 1991, the California Supreme Court denied the July petition in a nine-paragraph minute order. In February 1992, the court denied the amended petition in a two-line order.

In March 1992, petitioner informed this court that he had exhausted his state remedies. The court reopened the case. On April 3, 1992 petitioner filed a second amended petition.

This is the final petition in this action. On April 30, respondents filed a motion to dismiss procedurally defaulted claims and on May 8 filed their answer. On January 22, 1993, the undersigned recommended denial of the motion to dismiss. On August 5, the district court affirmed that recommendation.

On December 15, 1993 petitioner filed his traverse and a motion for an evidentiary hearing. In a June 22, 1994 order, this court granted in part the motion for an evidentiary hearing. The evidentiary hearing commenced on February 1, 1995. The undersigned took evidence in court through the end of February and, with the agreement of the parties, received other testimony in the form of depositions.

The parties have submitted final briefs on the merits of all claims.

ANALYSIS

I. Legal Standards

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). It is unavailable for alleged error in the interpretation or application of state law. Middleton, 768 F.2d at 1085; see also Lincoln v. Sunn, 807 F.2d 805,814 (9th Cir. 1987); Givens v.

Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986). However, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir.), cert. denied, 449 U.S. 922 (1980)); see also Lisenba v. California, 314 U.S. 219, 236 (1941). In order to raise such a claim in a federal habeas corpus petition, the "error alleged must have resulted in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962); Crisafi v. Oliver, 396 F.2d 293,294-295 (9th Cir.), cert. denied, 393 U.S. 889 (1968). Habeas corpus cannot be use to try issues of state law de novo. Milton v. Wainwright, 407 U.S. 371,377 (1972).

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (the "AEDPA") became law. See Pub. L. No. 104-132, 110 Star. 1214. The AEDPA contains two sets of revisions to the law governing federal habeas corpus. The first set amends chapter 153 of the Judicial Code which governs federal adjudication of all petitions for habeas relief. The second creates new chapter 154 which substantially revises procedures applicable to petitions seeking federal relief from a state court conviction and sentence of death. Chapter 154, however, will only apply if and when a state has met certain minimum standards qualifying that state to opt into the new procedures. The parties agree that chapter 154 is inapplicable to this case. The Ninth Circuit Court of Appeals determined that

the amendments to chapter 153 are inapplicable to federal habeas corpus cases, like the present one, filed prior to April 24, 1996. Jeffries v. Wood, 103 F.3d 827 (9th Cir. 1996) (en banc). Accordingly, the court has considered all claims under pre-AEDPA law.

II. Guilt Phase Claims

Despite petitioner's new evidentiary showings, the guilt-phase evidence that does not challenge is substantial. First, and most significantly, shortly after the shooting Ms. V identified petitioner as the perpetrator. Prior to her identification, her descriptions of her assailant were essentially consistent. After the shooting, Ms. V told various people that her assailant was dark-skinned,[3/] was 5'8" to 5'10" tall, had dark shoulder-length hair, had a dark moustache, and had at least a one-day-old beard. Petitioner's attempts at trial to discredit this eyewitness testimony were generalized. Second, Detective Southern testified that Ms. V told him about objects she had

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3. Petitioner argues that the victim inconsistently identified the perpetrator because she attempted to identify his ethnicity. At different times she referred to the perpetrator as Mexican, Indian, or Italian. RT 1570:25 - 1571:3; 1584:1-3; 2015:20; 2011:20-23; 2017:1-2, 7; 1538:23 1539:2; 1524:24 - 1525:12. However, the victim consistently described the perpetrator as being dark-skinned with dark hair. Petitioner testified at trial that at the time of the crimes he had a tan. RT 2086:21-27.

seen in the car. Ms. V testified that she had seen a black cool cushion and two rectangular pillows, one a dark color and the other a bright color. After impounding petitioner's car, officers brought the pillows to Ms. V on July 10, only two days after the shooting, and she identified them as the ones she had seen.[4/] Third, the women petitioner kidnapped during his flight testified that petitioner said he was a murderer. Petitioner's testimony that any statement he made to that effect was intended to scare the women into doing what he wanted was fully available to the jury and the members of the jury were free to give the testimony the weight they deemed appropriate.

Petitioner's guilt phase claims include prosecutorial misconduct regarding Peggy Steuben's testimony and ineffective assistance of counsel for failure to: (1) seek to exclude Kevin Jones' testimony, (2) present evidence of the effect of petitioner's drug and alcohol abuse on his flight, (3) move to exclude genetic marker evidence, (4) present an opening statement, and (5) object to the trial court's consideration of a probation report during a post-trial motion. Even if petitioner proves misconduct or ineffective assistance on every one of these claims, he cannot show, as described in detail below, that these errors, taken separately or cumulatively,

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4. Petitioner does make a Fourth Amendment claim that the pillows were seized in violation of his constitutional rights. However, as described below, because petitioner makes no showing of the denial of a full and fair hearing on the Fourth Amendment claim. the court should not reach that claim.

resulted in prejudice at trial or amounted to a violation of due process.

A. Prosecutorial Misconduct - Claim Nos. 1 and 2

Claim no. 1 charges that the prosecution committed misconduct by preventing the defense from interviewing Peggy Steuben and by manipulating her testimony. Steuben testified at trial that during a July 4, 1981 conversation with petitioner he told her that he would eliminate anyone who could send him back to prison. Steuben now states that petitioner only casually made general comments to that effect. 1994 Steuben Deck at ¶ 13.[5/]

Petitioner also alleges that the prosecution's investigator, Russell Herman, intimidated Steuben to manipulate her testimony by: (1) falsely telling her that petitioner was a member of the Aryan Brotherhood whose associates would kill her at petitioner's orders, 1994 Steuben Decl. at ¶ 19; and (2) telling her he would tie her pending child custody dispute to her willingness to testify, Raugust Depo. at 32:1-3. Petitioner also claims that Herman told Steuben not to

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5. Steuben also completed a declaration in 1990. Both declarations are pan of the record. Her 1990 declaration focuses mainly on the July 4 conversation. The 1994 declaration discusses that conversation and includes a description of Steuben's relationship with petitioner.

talk with the defense. 1994 Steuben Decl. at ¶ 22.[6]

Claim no. 2 alleges prosecutorial misconduct for Herman's failure to disclose that he had a number of interviews with Steuben but only recorded one interview.[7] The transcript of this interview was the only material from any of these interviews produced to the defense in discovery. Petitioner claims he should have been told that Herman felt Steuben was under the influence of drugs during some of the interviews and that her story changed frequently from interview to interview. Herman Depo. at 50:5 - 52: l; 61:5 - 62:2.

Prosecutorial misconduct does not, per se, violate a defendant's constitutional rights. Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986) and Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988)),

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6. In his deposition, Herman testified that Steuben told him petitioner was an Aryan Brotherhood member. Herman Depo. at 87:24 - 88:6. When Steuben said she did not want to talk with petitioner's attorney, Herman told her she did not have to talk with anyone if she did not want to. Id. at 81:13 - 82:1.

7. Steuben says she had eight to ten separate conversations with Herman. 1994 Steuben Decl. at ¶ 19. Herman testified he had "numerous" conversations with Steuben. Herman Depo. at 25:8. He estimated there were probably more than ten. Id. at 25:10-11.

cert. denied, 510 U.S. 1191 (1994). The court must find that the misconduct had an unconstitutional effect on the verdict. Assuming, without finding, the truth of petitioner's allegations, petitioner's claim that the prosecution manipulated Steuben's testimony amounts to a claim that the prosecution knowingly used false evidence. "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is 'any reasonable likelihood that the false testimony could have effected the judgment of the jury.'" United States v. Young, 17 F.3d 1201, 1203 (9th Cir. 1994) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)) (footnote omitted); Brown v. Borg, 951 F.2d 1011, 1015-16 (9th Cir. 1991). "[T]he standard of review applicable to the knowing use of perjured testimony is equivalent to the Chapman harmless-error standard." United States v. Bagley, 473 U.S. 667, 679 n. 9 (1985). Under Chapman, the beneficiary of a constitutional error must prove "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

Petitioner's claims that the prosecution prevented the defense from interviewing Steuben and failed to disclose potential impeachment evidence are examined under the more lenient standard described in Bagley. Prosecutorial misconduct in withholding exculpatory evidence amounts to unconstitutional misconduct where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A

'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682; see also United States v. Zuno-Arce, 44 F.3d 1420, 1427 (9th Cir. 1995), cert. denied, 116 S. Ct. 383 (1995). In 1995, the Supreme Court clarified the Bagley standard. The Court stated that prosecutorial misconduct in withholding evidence is unconstitutional if the withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1566 (1995). The Court also stressed that the test is not one of sufficiency of the evidence. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."

As described above, there was substantial evidence implicating petitioner at the guilt phase. Further, Steuben's alleged change in testimony would aid petitioner, if at all, only in a minor way. According to Steuben's declaration, she would now attempt to put her July 4 conversation "in context." 1994 Steuben Decl. at ¶ 9. She states that she and petitioner were having a discussion about the necessity of owning a gun for self defense. 1990 Steuben Decl. at 1:7-16. During that discussion petitioner told her "that as an ex convict he would not be treated fairly by the system and said he could understand how he, or someone like him, could kill the victim of a crime to stay out of prison as a matter of self defense." 1994 Steuben Decl. at ¶ 13; 1990 Steuben Decl. at 1: 13-16 (almost identical statement). Steuben is not recanting her testimony but simply attempting to

cast it in a slightly less harsh light.

Petitioner argues that if Steuben had testified truthfully, the trial court would have granted his motion to exclude the testimony. The trial court denied the motion, permitting the prosecution to introduce Steuben's testimony under the "admissions" exception to the hearsay rule. RT 1751. The California Supreme Court affirmed the trial court but disagreed with its reasoning. The high court concluded that the testimony was admissible as evidence of petitioner's state of mind. People v. Karis, 46 Cal. 3d 612, 636-37 (1988). Absent the prosecutorial misconduct, petitioner argues, Steuben's testimony that petitioner made general statements would not have satisfied the state-of-mind exception to the hearsay rule. Even if Steuben's testimony should have been excluded, this court cannot agree that its admission had an unconstitutional impact on the verdict.

Steuben's testimony served two potential purposes: identifying petitioner as the perpetrator and showing premeditation. As described above, the other identification evidence was substantial. The other evidence of premeditation was also substantial. The evidence showed that petitioner forced the victims into his car at gunpoint, drove to a remote location, raped one, and then walked them at gunpoint to a large hole where he forced them to kneel while he shot them. Given the extent and weight of the other identification and premeditation evidence, the court finds that there is no reasonable likelihood that Steuben's testimony affected the

verdict. Assuming admission of the evidence was error, it was harmless beyond a reasonable doubt. Of course, since Steuben's testimony is harmless error under the Chapman standard, it also fails to meet the Bagley standard for constitutional error.

The same is true for the penalty phase. Petitioner points to only one instance in which the prosecutor mentioned Steuben's testimony during the penalty phase. The prosecutor argued that petitioner's statements to Steuben were evidence that petitioner had planned his crime. RT 2559:16-21. The jury had already convicted petitioner of premeditated murder. Petitioner's trial counsel did not argue leniency at the penalty phase based on some lingering doubt about petitioner's guilt of premeditated murder. The prosecutor's statements, therefore, could have had no real effect on the jury's penalty phase decision making. There is no reasonable likelihood that the alleged prosecutorial misconduct with respect to Steuben's testimony affected the verdict.

Petitioner finally argues that he has alleged such an egregious pattern of prosecutorial misconduct that it cannot be deemed harmless error. Petitioner relies upon Hardnett v. Marshall, 25 F.3d 875 (9th Cir. 1994), cert. denied, 115 S. Ct. 942 (1995). In Hardnett, the Ninth Circuit explained a footnote in Brecht v. Abrahamson, 507 U.S. 619 (1993). Footnote 9 in Brecht described a type of error which may not be considered harmless. Such error occurs in "the unusual case" and is "deliberate and especially egregious" or "so combined with a

pattern of prosecutorial conduct" as to "infect the integrity of the proceedings." 507 U.S. at 638 n. 9. The question then is "Is this 'the unusual case' where the combination of misconduct and error infected the entire proceeding and destroyed its fairness?" Hardnett, 25 F.3d at 880. While petitioner in the present case alleges egregious conduct by the prosecution in intimidating Steuben and blocking the defense from interviewing her, the conduct, even if it occurred, affected only a limited portion of the trial testimony. As described above and in the June 22 order, there was substantial other evidence identifying petitioner as the perpetrator and showing premeditation. Consequently, the court finds that claims 1 and 2 do not allege the sort of prosecutorial misconduct described in footnote 9 of Brecht and in Hardnett.

B. Denial of Due Process Re Steuben's Testimony - Claim No. 3

Claim no. 3 alleges that the introduction of Steuben's trial testimony violated due process. Since the court finds above that admission of Steuben's testimony was harmless beyond a reasonable doubt, claim no. 3 must also fail.

C. Juror Misconduct - Claim No. 4

In claim no. 4, petitioner alleges that, sometime after the testimony of petitioner's identification expert Dr. Loftus, a juror asked a librarian at the Sacramento Public Library whether it carried any books authored by Dr. Loftus. Later, the juror

reported to other jurors that the library did not have any such books. In his petition, petitioner acknowledges that the statement to the other jurors likely occurred during the penalty phase. However, he now claims the question to the librarian and, perhaps, the statement to the other jurors occurred during the guilt phase. If only one juror's consideration of Loftus' credibility was affected during the guilt phase, petitioner argues, the error was not harmless. To the extent the juror's actions occurred during the penalty phase, petitioner argues that the lingering doubt about guilt could have affected the jury's penalty phase consideration.

1. Legal Standards

It is undisputed that the juror's questions regarding Loftus and report to other jurors are misconduct. See Bayramoglu v. Estelle, 806 F.2d 880, 886 (9th Cir. 1986) (introduction of extrinsic evidence breaches juror's duty to consider only the evidence presented). Once it is determined that a juror committed misconduct by obtaining or using evidence that had not been introduced into the trial record, it must be determined whether that misconduct was harmless. Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993), cert. denied, 510 U.S. 1191 (1994). While the court may not consider the effect of the extrinsic evidence on the jurors' subjective deliberations, id. at 1191 (citing United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981)), it may inquire into the extent to which jurors saw or discussed the extrinsic evidence, id. (citing Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988)).

There is a question about which harmless error standard applies. Traditionally, courts have examined whether the error was harmless beyond a reasonable doubt. See, e.g., Bayramoglu, 806 F.2d at 887. Fairly recently, however, the Supreme Court held that the harmless error standard applicable on collateral review of federal constitutional errors is "whether the . . . error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Petitioner argues that the Brecht standard only applies when the state court has engaged in Chapman analysis. The state court did not do so here.[8/] Respondents argue that Brecht applies to the analysis of all trial errors on collateral review.[9/]

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8. The California Supreme Court stated that jury misconduct may be rebutted by "an affirmative evidentiary showing that prejudice does not exist" or by a determination that there is no "reasonable probability of actual harm to the complaining party." 46 Cal. 3d at 642. The reasonable probability standard described by the California Supreme Court falls short of the Chapman standard required by the Constitution. See Gibson v. Clanon, 633 F.2d 851,854-55 (9th Cir. 1980) (proper standard for determining whether extrinsic evidence contributed to verdict is "beyond a reasonable doubt" not "reasonable probability"), cert. denied, 450 U.S. 1035 (1981).

9. The Court in Brecht distinguished between "trial

The Supreme Court in Brecht announced its holding as follows: "the Kotteakos harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." 507 U.S. at 638. However, earlier in the opinion the Court framed the issue in a way which supports application of its holding as petitioner urges: "we must decide whether the same harmless-error standard that the state courts applied on direct review of petitioner's Doyle claim also applies in this habeas proceeding." Id. at 635-36. The Court then stated that

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review.

Id. at 636 (citation omitted).

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errors" for which harmless error review is appropriate and "structural defects" which defy analysis by harmless error standards. 507 U.S. at 629-30. Harmless error analysis is appropriate for juror misconduct issues. Hanna v. Riveland, 87 F.3d 1034, 1038 (9th Cir. 1996).

Neither the Supreme Court nor the Ninth Circuit has addressed directly the issue raised by petitioner.[10/] Both courts have applied the Brecht standard to habeas cases without consideration of the extent of state court review. In O'Neal v. McAninch, 513 U.S. 432, 115 S. Ct. 992 (1995) the Court identified the Brecht standard as the one "normally applied by a federal habeas court in deciding whether or not this kind of constitutional 'trial' error is harmless." The Ninth Circuit has similarly applied Brech numerous times. See e.g., Williams v. Calderon, 52 F.3d 1465, 1476 (9th Cir. 1995), cert. denied, 116 S. Ct. 937 (1996); Hegler v. Borg, 50 F.3d 1472, 1474, 1478 (9th Cir.), cert. denied, 116 S. Ct. 675 (1995); Rice v. Wood, 77 F.3d 1138, 1144 (9th Cir.), cert. denied, 117 S. Ct. 191 (1996); Lee v. MarShall, 42 F.3d 1296 (9th Cir. 1994); Christian v. Rhode, 41 F.3d 461 (9th Cir. 1994).

The circuits which have examined the issue are split. Most have held that Brecht applies to habeas cases regardless of the state court's holding. See Sherman v. Smith, 89 F.3d 1134, 1140-41 (4th Cir. 1996), cert. denied, 117 S. Ct. 765 (1997); Castro v. Oklahoma, 71 F.3d 1502, 1516 n. 14 (10th Cir. 1995); Tyson v. Trigg, 50 F.3d 436, 446 (7th Cir. 1995), cert. denied, 116 S. Ct. 697 (1996); Horsely v. Alabama, 45 F.3d 1486, 1492 n. 11 (11th Cir.), cert. denied, 116 S. Ct. 410 (1995). However, the eighth circuit, relying on the passage quoted above, found

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10. The Ninth Circuit has recognized the issue but decided not to decide it. Hanna v. Riveland, 87 F.3d 1034, 1038 n. 2 (9th Cir. 1996).

that "the Brecht rule is based largely on the notion that because the state courts can properly apply the Chapman harmless error standard on direct review, the federal habeas courts need only review those decisions under the Kotteakos harmless error standard." Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993), cert. denied, 511 U.S. 1060 (1994). The confrontation clause violation at issue in Orndorff had never been presented to the state court. Consequently, since the federal court was the first to review for harmless error, the eighth circuit found that it should apply Chapman. Id. at 1430; see also Starr v. Lockhart, 23 F.3d 1280, 1292 (8th Cir.), cert. denied, 513 U.S. 995 (1994). At least one district court outside the eighth circuit has followed its reasoning. See Rickman v. Dunon, 864 F. Supp. 686, 712 (M.D. Tenn. 1994).

As discussed below, the court concludes that the juror misconduct was harmless beyond a reasonable doubt. Since the misconduct is therefore also harmless under the more lenient Brecht standard, the court need not decide, at this time, which standard applies.

2. Analysis

The Ninth Circuit has provided a framework for examining the effect of extrinsic evidence:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury

> discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

Jeffries, 5 F.3d at 1190 (quoting Bayramoglu, 806 F.2d at 887).

First, it must be determined when the juror's investigation and reporting occurred.[11] Petitioner argues that the weight of the evidence indicates that the Loftus investigation and remark occurred during the guilt phase. To the contrary, almost all evidence points to both events occurring

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11. It is unclear which party bears the burden here. On the one hand, a determination of when the misconduct occurred can be considered an aspect of proving misconduct, for which petitioner bears the burden. On the other hand, petitioner has shown misconduct and the timing of the misconduct relates to its effect on the verdict. The Supreme Court has recently held that courts should examine the question of harmless error without regard to burdens of proof. "The case before us does not involve a judge who shifts a 'burden' to help control the presentation of evidence at a trial, but rather involves judges who apply a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect." O'Neal, 115 S. Ct. at 995.

during the penalty phase. Petitioner's argument is directly supported by only one of the jurors' declarations and by a strained reading of other juror declarations. The jurors statements are summarized below.

The best evidence of when the Loftus investigation and remark occurred is the declaration of the juror who went to the library. In August 1982, less than a month after the jury returned a death verdict, juror Alan Hollums stated unequivocally that

> [D]uring the Penalty Phase of said trial I made inquiry of the librarian while I was checking out other books as to whether the librarian had books authored by Elizabeth Loftus. The librarian reported to me that the library did not have any books by Dr. Loftus. At some point thereafter, and while in the jury deliberation room I mentioned in passing that I had asked the librarian for books by Dr. Loftus and that she, the librarian, reported that she had none. My comment was not part of the jury deliberation . . . .

1982 Hollums Decl., CT 1065-66. In 1994, Hollums was deposed. He testified about the library incident but did not then recall at which phase of the deliberations it occurred. 1994 Hollums Depo. at 47-53.

The declarations of several other jurors, also completed shortly after trial, support Hollums' sworn statement

that his remark regarding Loftus occurred during the penalty phase. Jury foreman Timothy Jones stated that he heard Hollums' remark on Loftus "on the exact same day as Mrs. Terry stated the definition of the word mitigating." 1982 Jones Decl., CT 1067-68.[12/] There is no indication that the jurors would have discussed "mitigating" in anything but the penalty phase. Juror Jo Tindall stated that Hollums' remark occurred "[d]uring the Penalty Phase of the trial." 1982 Tindall Decl., CT 1071-72. Juror Robert Stacy declared that the Loftus remark was made "after the guilt phase of the trial was concluded and at a point in time near to the commencement of jury deliberations in the penalty phase." 1982 Stacy Decl., CT 1073-74.

Two other jurors heard the Loftus remark but did not recall, or simply did not identify, the phase of the trial in which

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12. Twelve years later, Mr. Jones stated that a juror had brought in a definition for "circumstantial." 1994 Jones Decl. The 1994 declaration does not mention the word "mitigating." In his 1995 deposition Mr. Jones attempted to reconcile the two declarations by stating that the jury discussed both words but that a written definition was brought in for only one word. He could not then recall which one. 1995 Jones Depo. at 35:23-36:6, 38:1-3. Jones testified that he did not look at a copy of his 1982 declaration before preparing his 1994 declaration. Id. at 36:13-18. The court finds Mr. Jones 1982 declaration, made shortly after trial, to be persuasive evidence that the Loftus remark occurred during the penalty phase.

it occurred. 1982 Terry Decl., CT 1069-70; 1982 Campbell Decl., CT 1085-86. In Joseph Campbell's 1994 declaration, however, he described Hollums' remark as follows:

> Shortly after a break when everyone was getting sealed for more discussions, one of the jurors stated that he or she had gone to the downtown public library and that a person who had testified (I do not remember the person's name) didn't have a book in the library. Afterwards there were a few comments back and forth for a few minutes. There was some laughing and jokes made. One juror said that we shouldn't put that much stock in it.

1994 Campbell Decl., ex. 42.[13/] Campbell was unsure when the remark was made but remembered "that the previous day the jury had discussed the testimony of the person who did not have any books at the library." Id. Petitioner argues that, since it is likely the jury discussed Loftus' testimony and the issue of identification during the guilt phase, the court should infer from Campbell's statement that the Loftus remark occurred during the

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13. Respondents object to the court's consideration of the 1994 Campbell and Stacy declarations. Contrary to respondents' assertions, these declarations were part of petitioner's December 22, 1994 motion for expansion of the record. The court granted the motion. June 23, 1994 Order. Accordingly, consideration of the 1994 Campbell and Stacy declarations is proper.

guilt phase.

Only one juror declaration directly supports petitioner's argument that the Loftus remark occurred during the guilt phase. Juror Robert Baldwin executed two declarations shortly after trial. In the first, prepared at the behest of petitioner's counsel, Baldwin simply states that a juror made the Loftus remark during guilt phase deliberations. Aug. 12, 1982 Baldwin Decl., CT 1019. In a second declaration, prepared at the behest of the district attorney, Baldwin repeated that the remark was made during guilt phase deliberations, though he stressed that it was not considered as part of the deliberations. Aug. 25, 1982 Baldwin Decl., CT 1087-88.

The court finds Mr. Hollums' declaration most persuasive. Since Hollums was the juror most involved in this incident of misconduct, he was more likely to have remembered when the events occurred. Hollums' statement that he questioned the librarian about Loftus during the penalty phase is the only direct information about when that event occurred. Hollums' statements about the timing of his remarks to fellow jurors are supported by the unequivocal statements of three other jurors that Hollums made the Loftus remarks during the penalty phase. Mr. Baldwin's declaration stands alone in placing Hollums' remarks in the guilt phase.

Under Jeffries the next questions are how long the jury was exposed to the extrinsic evidence and to what extent they discussed it. Mr. Hollums stated that the remark was made

"in passing" and that it "received no commentary from fellow jurors to the effect that they regarded my remark as part of the deliberation." 1982 Hollums Decl., CT 1066. Mr. Jones stated he told Hollums "that it was hard to find books at the college library" but he added that "[t]here was no commentary by any juror concerning any correlation between Hollums' remark and Dr. Loftus' professional qualifications or credibility." 1982 Jones Decl., CT 1068. Several jurors stated that they recalled no response to the remark and no discussion of it. 1982 Terry Decl. CT 1070; 1982 Tindall Decl., CT 1072; 1982 Stacy Decl., CT 1074; 1982 Campbell Decl., CT 1085. Five jurors declared that they were unaware any such remark had been made. 1982 Townsend Decl., CT 1075-76; 1982 Kolster Decl., CT 1077-78; 1982 Devol Decl., CT 1079-80; 1982 Quinn Decl., CT 1081-82; 1982 Holcomb Decl., CT 1083-84.

Although juror Campbell stated in 1982 that Hollums' comment "received no response or commentary by fellow jurors," in his 1994 declaration Campbell stated that after Hollums made the remark "there were a few comments back and forth for a few minutes. There was some laughing and jokes made. One juror said that we shouldn't put that much stock in it." Ex. 42. Since Campbell's 1994 statement conflicts with his 1982 declaration and with the recollection of other jurors, the court does not find it persuasive.

Another issue relevant to determining the effect of Hollums' remarks on the deliberations is the nature of the penalty phase. Guilt, or lingering doubt about guilt, was not an

issue. During the penalty phase argument, petitioner's counsel acknowledged petitioner's guilt. Petitioner does not now contend his trial counsel should have argued lingering doubt about identification.[14/] Dr. Loftus' testimony was solely relevant to the issue of identification. Therefore, Dr. Loftus's credibility was not relevant to the penalty phase determination and it is certain, beyond a reasonable doubt, that any aspersions cast upon her credibility did not contribute to the death verdict.

D. Ineffective Assistance of Counsel Re Kevin Jones' Testimony - Claim No. 5

Petitioner claims that counsel was ineffective for failing to object to admission of Kevin Jones' preliminary hearing testimony, for failing to move to exclude testimony of Kevin's extrajudicial statements to the police, and for consenting to the introduction of these statements. Kevin Jones' preliminary hearing testimony was easily impeached by the prosecution since Kevin gave a number of conflicting prior statements. Kevin's testimony was also harmful because it contradicted petitioner's testimony.

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14. Petitioner does argue that trial counsel should have presented evidence of petitioner's substance abuse at the penalty phase. He claims penalty phase counsel could have established a lingering doubt that petitioner planned the crimes. This lingering doubt argument does not involve identification, Dr. Loftus' focus.

In order to assess an ineffective assistance of counsel claim the court must first determine whether or not counsel's conduct met an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687 (1984). If the conduct did not meet such a standard, then petitioner must show that counsel's conduct prejudiced him. Id. at 691-92. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also United States v. Murray, 751 F.2d 1528, 1535 (9th Cir.), cert. denied, 474 U.S. 979 (1985); United States v. Schaflander, 743 F.2d 714, 717-718 (9th Cir. 1984) (per curiam), cert. denied, 470 U.S. 1058 (1985).

Considering the record herein, including the declarations and depositions of Mr. Tapson and Mr. Owen, petitioner's trial counsel, and the opinion of petitioner's expert, Thomas Nolan, the court finds trial counsel's conduct reasonable under Strickland.

Petitioner testified that the morning of July 8, 1981 he got up around 7:30 or 7:45 a.m., shaved, and drove to Placerville to cash his unemployment check and purchase a money order. RT 2034:25 - 2036:20. He testified that he then drove back home, arriving there at about 10:00 or 10:15 a.m. He did not leave his house again until about 1:00 or 1:30 p.m. when he and Kevin purchased some beer and drove to Georgetown Springs to drink it. RT 2037:16 - 2038:15. He and

Kevin returned home around 3:15 or 3:30 p.m. RT 2038:16-19. Petitioner testified that he had a moustache on July 8. RT 2050:5. He said that he shaved off the moustache the afternoon of July 9 after learning, through a telephone call home, that the police were looking for him. RT 2052:15-17.

The prosecution had Kevin Jones' preliminary hearing testimony read into the record. Kevin testified that on July 8, 1981, he awoke about 8:00 a.m. RT 1640:5-6. Petitioner was in the house when Kevin woke up. RT 1640:9-11. Kevin then testified that he, petitioner, and their mother drove to Placerville together about 8:15 or 8:30 a.m. to cash petitioner's unemployment check. RT 1640:14-16. They returned home around 9:30 or 10:00 a.m. RT 1640:27 - 1641:1. That afternoon petitioner and Kevin drove to Georgetown to get beer and returned home. RT 1641:3-13. Kevin testified that petitioner did not have a moustache on July 8, but that petitioner had shaved one off about a week before July 8. RT 1641: 16-24.

Kevin's preliminary hearing testimony included a number of attempts by the prosecution to impeach Kevin by pointing out inconsistencies in the various statements he had given to the police. Detective Tom Southern later testified to the inconsistent statements.

Kevin's first interview with police occurred in the back of a police car on the night after the crime. RT 1642:21-24. In that interview he told Detective Tom Southern that he

woke up about 10:00 a.m. on July 8, 1981 and that his brother had come home sometime shortly after 10:00 a.m. RT 1644:22-27; 1658:14-20. Kevin had also told detectives that petitioner shaved his moustache the morning of July 9 and that he told Kevin to tell anyone who asked that he had shaved his moustache a week before the crime. RT 1649:7-10; 1662:9-12.

In his closing argument defense counsel attempted to support petitioner's alibi by pointing out that Kevin's first statement to the police corroborated petitioner's story:

> Kevin Jones, Mr. Tepper has said the key to this case is Kevin Jones, because why would he say anything about a mustache, why would he even bother to talk about a mustache? Well, ladies and gentlemen, who is talking about a mustache? The police. The police were talking, they -- Kevin didn't raise the mustache, just, "Oh, by the way, Officer, he did," or "didn't have a mustache," or, "He shaved it off," or "didn't shave it off." That came in response to the policeman's question. They are asking about mustaches. And then sooner or later Kevin Jones figures out, "Wait a minute, what's going on here? What's this about a mustache?" Now, he's not too swift, granted, but there is one interesting thing here. Do you recall the conversations he had with Officer Southern, the first interview in the back of the patrol car that night, Wednesday night or Thursday night, the Karis residence? "Gee, what happened?"

"Well, I woke up about ten o'clock. Jim was gone. Mom was there. He came home a few minutes later."

Now, that is the conversation wherein he is off guard, hasn't had time to collect his thoughts, whatever, the first statement he makes to the police. "Jim's gone, I'm home, Mom's home."

What did Jim Karis testify to? He's gone, Kevin's home, Mom's home. He gets home about 10:00 o'clock. Before Kevin Jones ever had a chance to get his wits about him to talk about the mustache, to talk about anything, he said, "Jim got home."

Now, that's the conversation. That is consistent with what Jim Karis told you. Then we go into all this other extraneous nonsense.

Mr. Tepper starts talking about immunity to him. At that point, he probably said, 'I'm going to lay if off on Jim, this is getting too heavy for me. Jim told me to say all this. I'm going to get in trouble." And then when it comes time, his brother is in the courtroom, he gets back on the stand and goes back to this cockamamie story about him being with Jim. But, again, the first -- first conversation he had with Mr. Southern, "Jim is gone, got home about 10:00 o'clock. Mom is home," and so on.

RT 2229:24 - 2231:4.

In his deposition, defense counsel testified that Kevin's first statement to the police was the only available corroboration of petitioner's alibi. Tapson Depo., vol. 1 at 77:3-6. Petitioner's mother did not testify for a number of reasons. She did not want to testify and petitioner was adamant that she not testify at the guilt phase. Id., vol. 3 at 11:13-17, 9:8-15. Any potential testimony by petitioner's mother was further complicated by the facts that she had given a statement to police that differed from petitioner's version of the events of July 8, id., vol. 3 at 9:16-20, and she had attempted to give petitioner an alibi in a prior rape case, id., vol. 3 at 7:25 8:23; see also ex. C to Return to State Habeas Petition, item O.

Defense counsel testified that he considered whether or not to object to the introduction of Kevin's testimony. He felt that even if he kept Kevin's testimony out of the prosecution's case in chief, the prosecution would be able to use it in rebuttal. Tapson Depo., vol. 2 at 15:5-13. Petitioner makes much of the California Supreme Court's statement that had defense counsel objected, Kevin's testimony should have been excluded as irrelevant. People v. Karis, 46 Cal. 3d 612, 653 (1988). However, the California Supreme Court considered the propriety of the evidence as part of the prosecution's case-in-chief. The court found the evidence irrelevant because Kevin's testimony that he, his mother, and petitioner had driven to Placerville together "did not constitute direct or circumstantial evidence that defendant had perpetrated the offenses," and

Kevin's testimony regarding the moustache "was similarly exculpatory rather than incriminating." Id. at 653 n. 32. However, once petitioner testified that he had driven to Placerville alone and that he had shaved off his moustache the afternoon of July 9, Kevin's testimony became relevant in rebuttal. Since the testimony would likely have come in anyway, counsel's decision not to object to Kevin's testimony as part of the prosecution's case in chief was not unreasonable.

In a state court declaration, defense counsel stated that he was aware that Kevin's prior inconsistent statements could have been kept from the jury. Apr. 9, 1986 Tapson Decl., ex. 1 to first 1986 state habeas petition. Since Kevin's first statement to Detective Southern corroborated petitioner's story, counsel determined that he would waive any limitation on the evidence so that it could be considered by the jury for all purposes. Counsel then made use of Kevin's statements in closing argument. Even if counsel's decisions concerning Kevin's testimony and the impeachment were not the best decisions, they were well considered, deliberate, and well within the "wide range of professionally competent assistance" required by the Sixth Amendment. Strickland, 466 U.S. at 690.

Furthermore, petitioner was not prejudiced by counsel's failure to object to the evidence. As set forth above, while the California Supreme Court found that Kevin's testimony should have been kept from the jury had an objection been made, 46 Cal. 3d at 653, the evidence would likely have been admitted during rebuttal. Even if the testimony had

somehow been excluded, the result would have been the same. As described above, the eyewitness testimony, identification of the pillows, and petitioner's description of himself as a murderer were sufficient alone to convict. There is no reasonable probability that the result would have been different absent counsel's alleged error.

Nor was petitioner prejudiced by the failure to limit or exclude the prior inconsistent statements. If the prior inconsistent statements had been limited or excluded, petitioner would have lost the only corroboration of his alibi. He would have been left with only his brother's preliminary hearing account of July 8, which contradicted his own testimony. All things considered, there is no reasonable probability that the jury would have returned a different verdict had Kevin's inconsistent statements been excluded.

E. Ineffective Assistance of Counsel Re Substance Abuse - Claim No. 6

Claim no. 6 is that petitioner's trial counsel failed to investigate and present evidence of petitioner's use of methamphetamine and alcohol. The guilt phase aspect of this claim is that petitioner's flight was partially induced by paranoia and depression following an episode of heavy consumption of methamphetamine and other drugs during the Fourth of July weekend preceding the crime. As discussed in more detail below with respect to the penalty phase ineffective assistance claims, petitioner fails to show how counsel could

have discovered the extent of petitioner's drug use over the Fourth of July weekend. At that time, petitioner did not tell counsel about his drug use. Further, even if counsel had spoken to Jay Raugust, there is no showing that Raugust would have told counsel that petitioner took a substantial amount of drugs that weekend. See Raugust Depo., ex. 30, at 8:23 - 10:16. Petitioner has not shown counsel acted unreasonably.

In addition, petitioner has not shown prejudice. Petitioner provided a reason for his flight by testifying that he fled because he feared arrest for a parole violation. Since there was evidence that petitioner was cultivating marijuana, there was support for this testimony. The additional testimony of a drug-induced paranoia would have added some support for petitioner's testimony, but not enough to create a reasonable probability that the jury would have rejected the other evidence of guilt and rendered a different verdict.

F. Ineffective Assistance of Counsel Re Genetic Marker Testing - Claim No. 7

Petitioner alleges that trial counsel was ineffective for failing to move to exclude the genetic marker evidence on the basis that the underlying scientific method and the methodology used were unreliable. Petitioner points to a series of questions the prosecutor asked James Streeter, the state's criminalist, that resulted in the criminalist stating that only four percent of the population consisted of non-secretors, such as petitioner, with petitioner's 1 +2+ PGM type. RT 1974. However, petitioner

omits the fact that on cross-examination Mr. Streeter acknowledged that the semen could have come from a secretor, but that Streeter was unable to detect the blood type, and that it could have come from someone with a 1 +2+ PGM or a 2+2+ PGM. Mr. Streeter concluded on cross-examination that one out of four male persons could have produced the semen. RT 1984.

Petitioner seeks to show the Department of Justice's lack of standardized protocols for conducting PGM tests, Streeter's lack of qualifications, and that trial counsel failed to obtain Streeter's test notes.

While the prosecutor's questions on direct examination of Mr. Streeter may have produced misleading answers, petitioner's trial counsel effectively challenged the four percent statistic on cross-examination and gave the jury a balanced view. In addition, petitioner's counsel effectively explained the statistics in his closing argument. Defense counsel described how the prosecution stopped questioning Streeter after Streeter stated that only four percent of the population has petitioner's blood type. RT 2233:16-17.

> Mr. Tepper did not ask him about how many folks in the population could have contributed that semen, defense asked him.
>
> "Oh yes, by the way, twenty-four percent of the people could have contributed that semen."

> That means that if there were twelve male jurors in this case, three of them could have contributed that semen.

RT 2233:20-25. Streeter's testimony was far less damaging than petitioner asserts. Petitioner was not prejudiced under Strickland.

G. Ineffective Assistance of Counsel Re Miscellaneous Matters - Claim No. 8

The guilt-phase aspects of this claim, that are not addressed elsewhere. are that counsel: (1) failed to make an opening statement; and (2) failed to object to Judge Fogarty's consideration of the motion to suppress after venue was changed. These claims are insignificant in light of the substantial evidence supporting a conviction. Even if counsel acted unreasonably on these issues, and this court does not so find, petitioner has not shown that there is a reasonable probability that either or both of these issues, even considered with all the other ineffective assistance claims discussed above, affected the guilt verdict.

H. Jury Instruction Errors - Claim No. 9

Petitioner claims that the trial court violated his right to due process by improperly instructing the jury. Petitioner contends that by instructing pursuant to CALJIC No. 2.23, the trial court erroneously barred the jury from considering

petitioner's parole status as an explanation for his flight.

A challenge to jury instructions does not generally state a federal constitutional claim. See MiddletOn v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)), cert. denied, 478 U.S. 1021 (1986); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). Habeas corpus is unavailable for alleged error in the interpretation or application of state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991); see also Lincoln v. Sunn, 807 F.2d 805,814 (9th Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

To warrant federal habeas relief, a challenged jury instruction cannot be merely "undesirable, erroneous, or even universally condemned," but must violate some constitutional right. Estelle, 502 U.S. at 72 (citations omitted). To prevail, petitioner must demonstrate that an erroneous instruction "so infected the entire trial that the resulting conviction violates due process." Id. (citations omitted). Error in the state trial proceedings does not reach the level of a due process violation unless it involves "fundamental fairness." Id. at 73. The Supreme Court has defined the category of infractions that violate fundamental fairness very narrowly. Id. In making its determination, a court may not judge the challenged jury instructions in artificial isolation but must consider them in the context of the instructions as a whole in light of the trial record. Id. at 72.

Petitioner claims that the trial court improperly instructed the jury with regard to CALJIC No. 2.23 as follows:

> The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of the witness. The fact of such conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

RT 2258:5-13. Petitioner claims that this instruction improperly barred the jury from considering petitioner's parole status as an explanation for his flight. Petitioner contends that his parole status showed that petitioner fled because he was cultivating marijuana. Therefore, this fact was critical to rebut the presumption that his flight reflected consciousness of guilt for the charged crimes.

The trial court also gave the following instruction to the jury:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient, in itself, to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence.

> Whether or not evidence of flight shows consciousness of guilt and the significance attached to such circumstances are matters for your determination.

RT 2259:8-18. Petitioner did request that this instruction include the possible reasons, other than consciousness of guilt, for petitioner's flight.[15/] While the trial court rejected this request, the instruction given stressed that flight did not necessarily show consciousness of guilt. The evidence of flight was a factor for the jury to consider.

At trial, petitioner testified that the reason for his flight was his parole status. The court finds that a reasonable juror would have understood the instructions to permit

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15. Petitioner requested the following addition to the form jury instruction:

> In your consideration of the evidence of flight (concealment) you should consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to appear as a witness. Let me suggest also that a feeling of guilt does not necessarily reflect actual guilt.

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consideration of possible explanations, including petitioner's parole status, for his flight. Viewed in the context of the entire charge to the jury, this court cannot find that the use of this instruction rendered petitioner's trial fundamentally unfair so as to violate due process.

I. Exclusion of Ex-Felons and Resident Aliens from Jury Venire - Claim No. 10

Petitioner claims that the exclusion of ex-felons and resident aliens from the jury venire violated his constitutional right to a jury drawn from a fair representative cross-section of the community. Before trial, the court denied petitioner's motion to quash the jury venire due to the exclusion of ex-felons and resident aliens. A May 27, 1982 stipulation stated that in Sacramento County ex-felons and resident aliens are removed from the master list used to select jury panels. In addition, all reasonable efforts are made to prevent such persons from serving on petit juries. CR 672-75.

The selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. Taylor v. Louisiana, 419 U.S. 522, 528 (1975). While the "venires from which juries are drawn must not systematically exclude distinctive groups in the community," the Court does allow states discretion to select juries. Id. at 538. The "fair cross-section principle of jury selection must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors

and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." Id. at 538.

To make a prima facie showing of a violation of the cross-section requirement, petitioner must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 363 (1979). To rebut this showing, respondents must demonstrate a "significant" state interest justifying the exemption. Id. at 368.

Assuming, without deciding, that resident aliens and ex-felons are "distinctive" groups, the parties' state court stipulation that all efforts are made to exclude these groups from the jury venire establishes the remainder of the prima facie case. The "only remaining question is whether there is adequate justification for this infringement." Id. at 368 n. 26. With respect to resident aliens, in a case summarily affirmed by the Supreme Court, a district court found a compelling state interest in confining jury service to citizens. Perkins v. Smith, 370 F.

Supp. 134 (D. Md. 1974), aff'd, 426 U.S. 913 (1976). Further, as recognized in Perkins, the Supreme Court had previously stated that the "states remain free to confine the selection [of jurors] to citizens." Perkins, 370 F. Supp. at 136 (citing Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970)).

With respect to ex-felons, the Court has held that a state constitutional provision disenfranchising convicted felons does not deny equal protection. Richardson v. Ramirez, 418 U.S. 24 (1974). In addition, the Eighth Circuit Court of Appeals has held that the exclusion of persons against whom felony charges are pending from jury eligibility does not violate the fair cross-section requirement. United States v. Greene, 995 F.2d 793 (8th Cir. 1993). In both cases, legitimate state interests, including assuring the probity of jurors, were found to exclude charged felons or ex-felons from jury venires. Those interests support the exclusion of ex-felons under the Sixth Amendment. Claim no. 10 should therefore be denied.

J. Unreasonable Search and Seizure/Biased Tribunal - Claim Nos. 11 and 12

After ordering venue transferred to Sacramento County due to prejudicial pretrial publicity, the El Dorado County Superior Court Judge heard petitioner's suppression motion. In claim no. 11 petitioner alleges that the judge was biased because of the publicity and because he was an elected official. Claim no. 12 is the Fourth Amendment claim that the search of petitioner's vehicle was unconstitutional.

A federal court will only apply the exclusionary rule in a habeas proceeding upon a showing that: (1) the state prisoner was denied an opportunity for a full and fair litigation of his or her Fourth Amendment claim; and (2) there has been a Fourth Amendment violation. Stone v. Powell, 428 U.S. 465, 495 n. 37 (1976). Petitioner has not made an adequate showing that he did not receive full and fair litigation of his Fourth Amendment claim. The record herein shows little more than petitioner's allegation that the judge must have been biased because he held an elected position and pretrial publicity was vast and inflammatory. Such conclusory statements are insufficient to show that petitioner did not receive a full and fair hearing. Consequently, the court should not reach the merits of the alleged Fourth Amendment violation.

K. State Court's Refusal to Hear Argument - Claim No. 13

Petitioner alleges that the California Supreme Court denied him the fight under California Government Code § 68081 to address the grounds for the court's ruling on one of his claims. Government Code §68081 states that an appellate court must allow supplemental briefing or rehearing if the court bases its ruling on an issue not proposed or briefed by any party. Here, the state court based its ruling on grounds not raised by the parties and did not permit the parties an opportunity to have the issue reheard.

Federal habeas relief does not lie for errors of state

law. Such an error only implicates due process if it involves fundamental fairness. Estelle v. McGuire, 502 U.S. 62, 67 (1991). Petitioner does not show that he was prejudiced by the state's court's refusal to rehear argument on the claim. Thus, the state court's actions do not amount to a violation of due process. Claim no. 13 should be denied.

L. California Supreme Court's Failure to Consider Cumulative Impact of Errors - Claim No. 14

Petitioner alleges that the California Supreme Court failed to provide meaningful appellate review by failing to consider the cumulative impact of errors. On appeal, petitioner argued that the cumulative impact of penalty phase errors required that his sentence be set aside. AOB at 146-48. The California Supreme Court directly addressed this claim - "we likewise find no merit in his claim that the cumulative prejudicial effect of the 'errors' he has identified requires that the penalty be set aside." People v. Karis, 46 Cal. 3d 612, 648 (1988). Claim no. 14 is baseless and should be denied.

M. Jury Misconduct at the Penalty Phase - Claim No. 15

Claim no. 15 involves juror misconduct when a juror consulted a dictionary for the meaning of the word "mitigating."[16/] "Mitigating" appeared in the trial court's penalty

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16. Petitioner also claims that one or more jurors

phase instructions several times:

> It is now your duty to determine which of the two penalties, death or confinement in State prison for life without possibility of parole shall be imposed upon the Defendant. After having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death; however, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the State prison for life without possibility of parole.

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consulted a dictionary for the definition of "circumstantial." Juror Jones is the only one who identified "circumstantial" as a word for which a dictionary definition was provided. 1994 Jones Decl. However, as discussed, infra, in note 17, Jones recollection of the discussion of that word makes clear that he was thinking of "mitigating." Jones' deposition testimony that "circumstantial" was also discussed and looked up is not convincing. Accordingly, the court finds insufficient evidence of juror misconduct regarding the word "circumstantial."

. . . .

> In considering taking into account being guided by the aggravating and mitigating circumstances, you may not decide the affect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by their relative number, but rather by their relative convincing force on the ultimate question of punishment.
>
> If a factor is not found to be, by you, a mitigating factor, that, in and of itself, does not make that factor an aggravating factor, unless the Prosecution proves to you that factor is an aggravating factor.

RT 2599:1-14; 2599:26 - 2600:8. "Mitigating" is mentioned again in the instructions with respect to weighing. RT 2560:9-12; 2602:20 - 2603:3. While "mitigating" is not specifically defined in the instructions, the trial judge restated the weighing process as follows:

> In determining the question of penalty to be imposed upon the Defendant, you shall weigh the sympathetic element of Defendant's background against those that may offend the conscience. In so doing, the jury may consider pity, sympathy, and

> mercy; however, you may not be governed by conjecture, prejudice, or public opinion.

RT 2600:13-18.

It is not disputed that during penalty phase deliberations jurors discussed the meaning of "mitigating." Helmsin Depo. at 54:2-6; Jones Depo. at 12:19-25; Evidentiary Hearing Transcript ("ET") 2-6:23 - 8:12 (testimony of Tindall); ET 1-47:1-6, 1-52:13 - 53:1 (testimony of Stacy); ET 1-81:16-20 (testimony of Campbell); ET 1-113:22 - 114:4 (testimony of Holcomb); Hollums Depo. at 29:12 - 30:6. Juror Tindall testified that "there was [sic] opinions as to what the word meant, I recall, and I recall that we wanted the exact black and white what the word meant." ET 2-49:15-17. Juror Hollums recalled that "there was some question about exactly what [the word mitigating] meant" and that "just about everybody participated in that discussion." Hollums Depo. at 30:8-16. Juror Stacy testified that "[t]here were some people on the jury who did not know the word 'mitigating.'" ET 1-55:12-13. Juror Helmsin testified that "there was a question in my mind as to the definition of a word." Helmsin Depo. at 13:26 - 14:1. The word was mitigating. Id. at 14:5-6. Jury foreman Jones described the course of the discussion of the word "mitigating:"

> To the best of my recollection, I would say the discussion arose after lunch, using general time flames, continued through after lunch on the first day, continued into the end of our day of deliberations, not

> intensely focused on that particular issue all afternoon, but we talked about it.
>
> Tension would -- there would be some tension present. We would drop it for a little while, look at other things, come back to it. And we sort of did that through the afternoon.
>
> And by the time we separated at the end of the day, I recall there wasn't a whole lot of tension at that point; however, the definition and/or resolution of these particular words was not taken care of.
>
> So we started the following day. At some point the first part of the morning, we took a vote, and it wasn't unanimous, and so the discussion followed again.

Jones Depo. at 19:2-18.[17/]

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17. Jones' testimony is somewhat confusing. In his 1982 declaration Jones stated that juror Terry had looked up the word "mitigating" and provided other jurors with the dictionary definition. CT 1067-68. In a 1994 declaration, Jones recalls that the word looked up and reported was "circumstantial." Ex. 17. Jones makes no mention of "mitigating" in the 1994 declaration. In his deposition, Jones could not identify whether the word which was discussed, looked up, and reported was "mitigating" or "circumstantial." Jones Depo. at 12:24-25.

The evening after the jurors' discussions, juror Terry (now Helmsin) consulted a dictionary at home. Helmsin Depo. at 13:26 - 14: 1. She looked up the definition of "mitigating." Id. at 21:17-21. The next morning, Terry communicated the definition of "mitigating" to other jurors. Id. at 18:17 - 19:4; Jones Depo. at 21:4-6; Kloss Depo. at 11:5-6; ET 2-6:9-15 (Tindall). Juror Jones testified that Helmsin communicated the definition after the jurors took a vote the morning of the final day of deliberations. Jones Depo. at 19:19-21. He recalled that Helmsin read the definition from a piece of paper and placed the paper on the table. Id. at 88:10 - 90:9. "Several of the jurors passed the piece of paper among themselves and read the definition and uttered the definition from the piece of paper aloud." Id. at 90:6-8. According to Jones, for at least fifteen minutes thereafter jurors discussed "the definition of the word and how it might change and/or affect the opinion of several jurors." Id. at 21:5-6. Jones also recalled that "it wasn't too much longer after that that we came to a unanimous decision." Id. at 98:7-8. At 11:28 a.m. on July 29, 1982, the Court reconvened to receive the jury's death verdict. RT 2623:3-23.

Because Jones' 1982 declaration, prepared shortly after trial, refers to "mitigating" and because the series of events Jones describes is quite similar to the events described by other jurors with respect to the word "mitigating," Jones' deposition testimony regarding jury discussion of a word undoubtedly refers to "mitigating."

1. Legal Standards

The juror's consultation of a dictionary was misconduct. See Marino v. Vasquez, 812 F.2d 499, 505 (9th Cir. 1987); Bayramoglu v. Estelle, 806 F.2d 880, 886 (9th Cir. 1986). In this circuit, unauthorized reference to a dictionary definition establishes a presumption of prejudice. Marino, 812 F.2d at 505. The state has the burden of proving the error was harmless.[18/] Id. While the court may not consider the effect of the extrinsic evidence on the jurors' subjective deliberations, Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) (citing United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982)), cert. denied, 510 U.S. 1191 (1994), it may inquire into the extent to which jurors saw or discussed the extrinsic evidence, id. (citing Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988)).

The Tenth Circuit has provided a framework for examining the effect of a jury's consideration of a dictionary definition:

(1) The importance of the word or phrase being

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18. As discussed above with respect to claim no. 4, petitioner raises an issue about the appropriate harmless error standard here. Since the undersigned finds the juror misconduct of claim no. 15 harmless beyond a reasonable doubt, it is unnecessary to determine whether or not the less strict Brecht standard applies.

defined to the resolution of the case.

(2) The extent to which the dictionary definition differs from the jury instructions or from the proper legal definition.

(3) The extent to which the jury discussed and emphasized the definition.

(4) The strength of the evidence and whether the jury had difficulty reaching a verdict prior to introduction of the dictionary definition.

(5) Any other factors that relate to a determination of prejudice.

Mayhue v. St. Francis, 969 F.2d 919, 924 (10th Cir. 1992).

2. Analysis

Jury misconduct is prejudicial "where there is a direct and rational connection between the extrinsic material and a prejudicial jury conclusion." Lawson v. Borg, 60 F.3d 608, 612 (9th Cir. 1995). The court finds the dictionary definition supplied would not have had an effect on the verdict. This finding is based, in large part, on the fact that the definition supplied to the jury did not differ substantially from the legal definition.

At first glance, several of the Mayhue factors support a finding of prejudice. The concept of mitigation was central to the jurors' penalty phase decision. Their decision hinged on whether the aggravating factors outweighed the mitigating factors. RT 2599. Facts show that the jurors discussed the word "mitigating" for a considerable amount of time -- through one afternoon and again the following rooming. In addition, it appears that juror Terry announced the dictionary definition shortly before a final verdict was reached.

An examination of the definition produced, however, shows that this jury misconduct did not prejudice petitioner. The "nature of the extrinsic evidence introduced" is entitled to "great weight." Lawson, 60 F.3d at 612. Here, the dictionary definition did not differ substantially from the legal definition, particularly when considered in the context of the other jury instructions.

The trial court did not define the term "mitigating." However, its meaning could be understood from the fact that each time the term was used in the instructions it was juxtaposed against "aggravating." In addition, the court gave the jury another way to look at the weighing process: "you shall weigh the sympathetic elements of Defendant's background against those that may offend the conscience. In so doing, the jury may consider pity, sympathy, and mercy; however, you may not be governed by conjecture, prejudice, or public opinion." RT 2600:13-18.

The Courts have broadly defined "mitigating" to include "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). The dictionary definition provided by juror Terry was "to make or become milder, less severe, less rigorous, or less painful." People v. Karis, 46 Cal. 3d 612, 644 (1988).[19] Petitioner argues that the dictionary definition of "mitigating" caused jurors to consider only those factors that lessened the severity of the crime. Petitioner's argument ignores the trial court's additional weighing instruction. The trial court's recharacterization of the weighing process let the jury understand that mitigating circumstances could include "sympathetic elements" of petitioner's background. There is no reason to think the jury ignored this instruction. The dictionary definition basically showed the jury that "mitigating" was the opposite of "aggravating." 1982 Tindall Decl. Given the instruction permitting consideration of sympathetic elements, it is not possible that the dictionary definition caused the jury to improperly consider mitigating circumstances or improperly weigh the aggravating against the mitigating circumstances. There is no "direct and rational connection" between the dictionary definition of "mitigating" and the death verdict. Claim no. 15 should be denied.

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19. The parties agree that this is the definition provided by juror Terry.

N. Testimony of Past Victims at the Penalty Phase - Claim No. 16

Petitioner claims that the trial court erroneously admitted testimony of past victims at the penalty phase. Prior to the penalty phase, the defense moved to exclude the live testimony of the victims associated with petitioner's 1971 and 1976 rape convictions. CR 876-78. At the hearing on this motion, defense counsel stated that he was prepared to stipulate to every factual aspect of these two prior crimes. RT 2395; 2401-03. The defense was also willing to stipulate to the prosecution reading the police reports to the jury verbatim. RT 2395. The prosecution objected to the stipulation, and the trial court later permitted three victims of the prior crimes to testify. RT 2397:15-16; 2413-14.

Petitioner claims that his Eighth Amendment fights were violated by the admission of this inflammatory evidence at the penalty phase. Since the prosecution rejected the defense's request to stipulate to the facts of the previous crimes, petitioner argues that the sole purpose of introducing testimony from the victims was for the emotional impact. Petitioner claims that emotional impact is an impermissible factor for the jury to consider in imposing a death sentence. Petitioner relies on the Eighth Amendment requirement that the criteria used to impose a sentence of death be reliable and non-arbitrary. Johnson v. Mississippi, 486 U.S. 578, 584-85 (1988).

1. Legal Standards

Even if admission of evidence was erroneous under state rules, the issue is cognizable under § 2254 only if constitutional rights were violated. Butcher v. Marquez, 758 F.2d 373,378 (9th Cir. 1985) (citing Gutierrez, 695 F.2d at 1197-98); see also Wainwright v. Goode, 464 U.S. 78, 84 (1983); Lisenba v. California, 314 U.S. 219, 228-29 (1941). Claims of erroneous admission of evidence are cognizable in habeas corpus proceedings when the admission of evidence violated due process rights by rendering proceedings fundamentally unfair. Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.), cert. denied, 512 U.S. 1220 (1994). In capital cases, the Eighth Amendment requires that decisions to impose the death penalty cannot be based on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (citing Zant v. Stephens, 462 U.S. 862, 884-85, 887, n.24 (1983)).

2. Analysis

Petitioner claims that the testimony of the past victims at the penalty phase violates the Eighth Amendment because testimony presented for the sole purpose of emotional impact is arbitrary and capricious. However, the Supreme Court has ruled that testimony for the purpose of showing emotional impact is admissible in the penalty phase, even if the testimony does not present facts relating to the crime. Payne v. Tennessee, 501 808

(1991) (jury may consider victim impact evidence regarding victim's personal characteristics and impact of crime on the victim's family). The issue then is whether the testimony was so unduly prejudicial that it rendered the trial fundamentally unfair. Id. at 825; see also Williams v. chrans, 945 F.2d 926, 946-47 (7th Cir. 1991), cert. denied, 505 U.S. 1208 (1992).

In the present case, there is little doubt that the testimony of the victims had an emotional impact on the jury. However, the emotional impact testimony was limited. The victims of the previous crimes testified briefly to the events occurring prior to the acts of violence and simply stated that the rapes occurred.[20/] None of the victims testified to the details of

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20. The 1976 victim's testimony consisted mainly of describing how she met the petitioner and the location where the rape occurred. She did not testify to any of the events that occurred after her clothes were removed. RT 2432-2441. The parties stipulated that an act of sexual intercourse by means of force and fear was committed by petitioner. RT 2441:5-9

The testimony of a witness to the 1971 rape consisted mainly of describing how she and her friends met the petitioner and the location where the rape occurred. RT 2466-2476. She testified that she saw the victim take her clothes off and bodies disappear behind the seat of a car. RT 2475:5-8.

The 1971 victim testified that she was scared to death when petitioner told her to take off her clothes. RT 2480:15-21. She testified that she was forced to have sexual intercourse with the petitioner. RT 2480:26. She also testified to another act of

the rapes nor did they describe with any detail their emotional states, past or present.[21/] The factual details of the crimes would have come in anyway because defense counsel was willing to stipulate to a recitation of the police reports. Therefore, this court cannot find that the testimony of the past victims at the penalty phase was so unduly prejudicial as to render the penalty phase fundamentally unfair.

O. Ineffective Assistance of Counsel at the Penalty Phase - Claim Nos. 6, 8, and 17

In each of these claims petitioner asserts ineffective assistance of counsel at the penalty phase. Claim 6 is that counsel failed to investigate and introduce evidence of petitioner's history of alcohol and drug abuse and of methamphetamine psychosis and withdrawal. Claim 8 is: (1) that during post-penalty phase motions counsel failed to object to the trial court's consideration of a probation office report, and (2) that during the penalty, phase counsel failed to present in mitigation any evidence of petitioner's military service or of

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forcible sexual intercourse by the man who accompanied petitioner. RT 2484:1-3.

21. Although the trial court record does not reflect Debra Brinker's emotional condition while testifying, petitioner's brief states that both parties stipulated to the fact that the rape occurred because the witness began crying. This factor does not change the court's analysis.

petitioner's neurological impairment.[22/] Finally, claim 17 is that counsel failed to investigate and present mitigating evidence of petitioner's childhood, family history, and family dynamics.

On an ineffective assistance of counsel claim, the court must first determine whether or not counsel's conduct met an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must then show that counsel's conduct prejudiced him. Id. at 691-92. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also United States v. Murray, 751 F.2d 1528, 1535 (9th Cir.), cert. denied, 474 U.S. 979 (1985); United States v. Schaflander, 743 F.2d 714, 717-718 (9th Cir. 1984) (per curiam), cert. denied, 470 U.S. 1058 (1985).

1. Failure to Investigate Childhood, Family, and Abuse

Petitioner's primary claim is that counsel failed to present significant mitigating evidence of petitioner's childhood poverty and abuse and of the family dynamics. At the time of

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22. Claim 8 includes an ineffective assistance of counsel claim for failure to object to the introduction of petitioner's 1976 rape conviction. That issue is not addressed here because it is covered by claim no. 28.

trial, a California penalty phase jury was required to consider such mitigating evidence. An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986), cert. denied, 481 U.S. 1042 (1987); see also G. Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U.L. Rev. 299, 323-24 (May 1983). The Ninth Circuit has stressed the importance of presenting substantial mitigating evidence:

> The issue for the jury is whether the defendant will live or die . . . . The sentencing hearing is defense counsel's chance to show the jury that the defendant, despite the crime, is worth saving as a human being . . . . To fail to present important mitigating evidence in the penalty phase - if there is no risk in doing so - can be as devastating as a failure to present proof of innocence in the guilt phase.

Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992)(quoting Mak v. Blodgett, 754 F. Supp. 1490, 1500 (W.D. Wash. 1991)), cert. denied, 507 U.S. 951 (1993). Evidence of a defendant's background and upbringing are particularly relevant:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged

> background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Boyde v. California, 494 U.S. 370, 382 (1990) (emphasis in original).

Petitioner presented expert testimony from Thomas Nolan, a certified criminal law specialist since 1977, who has represented defendants in numerous capital murder cases. Nolan Decl. ¶ 1.1, 1.2. He testified, without contradiction, that the standard of practice in 1982 required penalty phase counsel:

> to investigate, prepare and consider presenting evidence of the client's family history, including family dynamics, any physical abuse, mental and physical illness, and the family's socioeconomic status. Then, as now, every juror wanted to know where the defendant came from and how he came to sit before them convicted of a capital crime. Jurors intuitively understand that some people are dealt a poor hand in life, through their genetic and social inheritance and their family environment.
>
> Penalty phase counsel was required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history. In particular, defense counsel was required

> to attempt to find and interview: the client, members of the client's immediate family, relatives and acquaintances who were percipient witnesses to the life history of the client, his parents and his immediate family, friends, ...

Id. ¶ 16 and 17. Respondents presented no expert opinion to the contrary. Penalty phase counsel testified that he felt that in 1982 he had a duty only to interview the defendant's parents. Owen Depo. Vol. III at 64:7-12. However, he admitted that in 1982 a family history could go beyond the immediate family to include "school teachers, some neighbors, relatives." Id. at 64:22 - 65: 1.

Here, counsel or his investigator spoke to only three of petitioner's family members: petitioner's mother Eva Marie Jones, his brother Kevin Jones who had suffered brain damage, and his aunt Marlene Younger. Owen Depo. at II:46:23 - 47:8. Counsel testified that he was unsure why he did not interview Younger's son, Danny Howell, who, in addition to being petitioner's cousin, was petitioner's close friend. Id. at II:56:11-19. Counsel testified that he considered interviewing, or interviewed, only a few other people. He interviewed one neighbor, Mrs. Beckman, who told him that essentially petitioner was a normal child. Id. at III:28:15 - 29:8.[23/]

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23. Owen testified that he brought Mrs. Beckman to court and intended to put her on the stand. However, he felt her testimony would be anticlimactic after petitioner's mother's

However, the Beckmans did not become acquainted with petitioner and his mother until after Mrs. Jones divorced Courtney Jones, her second husband. See Kenneth Beckman Decl. ¶ 2. Thus, Mrs. Beckman's testimony would not have been particularly helpful regarding petitioner's mother's relationship with petitioner's father James St. and Courtney Jones. Counsel also interviewed "one or two teachers." Owen Depo. at III:28 :a5-16. Counsel considered and decided against interviewing James Karis Sr. or Courtney Jones. He intended to portray them as the "heavies" at the penalty phase. Id. at II:56:20 - 57:21. Counsel feared that if he contacted them, Karis and Jones might go to the district attorney to deny beating petitioner's mother and "thereby undermine the only evidence that we had." Id.

Counsel's theme for the penalty phase was that petitioner was a human being who was worthwhile and talented. Id. at II: 100:21-26. Without directly saying so, counsel tried to show that petitioner could be productive and nonviolent in prison. Id. at II:101:1-6. Counsel was careful not to present direct evidence that petitioner would do well in prison. Counsel felt evidence of good prison behavior would have opened the door to damaging rebuttal evidence of petitioner's prior escape attempt and of a petitioner's involvement in a prison drinking incident during which an inmate was killed. Id. at III:38-39; III:41:22 - 42:10.

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testimony during which petitioner and his mother both cried. Owen Depo. at III:29:9-20.

Penalty phase counsel acknowledged that evidence of abuse of petitioner and of his mother when petitioner was a child was not inconsistent with the penalty phase case. Owen Depo. at II:48:33 - 49:38. In fact, until about a week before the penalty phase began, counsel intended to give the jury specific information on such abuse through the testimony and report of Dr. Albert Globus.[24/] Id. Guilt phase counsel had hired Globus, a psychiatrist and neurologist, to evaluate petitioner's mental status. Globus Decl. ¶ 2. Globus interviewed petitioner's mother, among others. See Psychiatric Report prep'd by Albert Globus ("Globus Report"), ex. 9 to Owen Depo. Mrs. Jones told Globus about petitioner's father's, James Sr.'s, sexual abuse of James Sr.'s half-sister, that James Sr. "played around," and that she finally divorced James Sr. when petitioner was two after James Sr. asked her to become a prostitute. She told Globus that she remarried when petitioner was five or six years old. According to Mrs. Jones, this husband "beat me up all the time." She also said he would "go after Jim to get at her."

Penalty phase counsel testified that he, after consultation with guilt phase counsel, decided not to call Dr. Globus during the penalty phase because there was a good deal

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24. Petitioner's expert, Thomas Nolan, testified that using a doctor to testify to the underlying facts was consistent with a reasonable standard of care in 1982. Nolan Depo. at 117:2-7. However, Nolan testified that counsel could not rely upon the doctor to develop the entire family history. Id. at 129:9 - 130:13.

of damaging evidence in the doctor's report. Owen Depo. at II:48:33 - 49:38; II:59:24 - 60:4; IV:107:17-23. In fact, counsel's copy of the report shows that counsel marked twenty-three potentially damaging points in the report. Ex. 9 to Owen Depo. These range from petitioner's identification of the victims of his first rape as "chicks" to description of a liquor store robbery committed when petitioner was a juvenile. Id. Counsel's decision not to use Globus is the sort of considered tactical decision that falls within the Sixth Amendment's guarantee of reasonably competent counsel. See Strickland, 466 U.S. at 690. However, counsel failed to prepare for the possibility of omitting Globus's testimony.

From Globus's report, counsel knew that petitioner's mother told Dr. Globus about family abuse. Based on Globus's reports, counsel believed that petitioner had witnessed his mother being beaten by Courtney Jones and "potentially James Karis Senior." Owen Depo. at II:48:3-6; 51:19 - 52:4. Counsel testified that he asked petitioner's mother about abuse and she denied any physical abuse. Id. at II:48:10-21; IV:100:8-15. He also testified that petitioner "never told me what Mrs. Jones had told Dr. Globus," id. at II:50:4-8, and that Marlene Younger, petitioner's aunt, did not give him any information about abuse by Courtney Jones.[25/] Id.

Contrary to counsel's testimony, Mrs. Jones testified that counsel did not ask her about abuse, she did not deny that

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25. Ms. Younger is Courtney Jones' sister.

it occurred, and that, if asked, she would have testified to it at the penalty phase. E. Jones Depo. at 88:1.7 - 89:13. She also testified that petitioner did not tell her not to testify about the abuse. Id. at 24: 14-25. There is no indication that counsel specifically asked Ms. Younger about abuse. Ms. Younger similarly testified that if asked directly about Courtney Jones' abuse of Mrs. Jones she would have told counsel about it and would have testified to it in court. Younger Decl., ex. 37, ¶ 23.[26/]

While it is clear that petitioner told counsel he did not want his mother embarrassed on the witness stand, Owen Depo. at II:48:33 - 49:38, and that counsel felt this impeded the preparation of the penalty phase, id. at II:80:10-20, counsel acknowledged that petitioner did not order him not to put his mother on the stand, id. at IV:151:9-14. Similarly, petitioner did not order counsel to refrain from introducing any evidence

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26. It is not clear that counsel could have discovered the abuse from Ms. Younger. In her October 13, 1994 declaration Ms. Younger described the Jones' marriage without describing physical abuse. She simply stated that Courtney and Marie "had a hard time getting along . . . . They both had quick tempers, and got jealous easily--if one of them was out late, the other automatically accused them of being unfaithful." Younger Decl., ex. 37, ¶ 18. It was not until she testified at the evidentiary hearing that Ms. Younger described specific incidents when Courtney beat Marie. Younger Depo. at 64:7 - 65:7.

of the abuse of his mother. Yet, even if petitioner had so ordered, counsel still had an obligation to investigate the abuse. When a defendant tells his attorney not to pursue certain avenues of investigation, counsel still has a duty to "evaluate the potential avenues of investigation and then advise the client of their merit." Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986), cert. denied, 483 U.S. 1033 (1987). "A strategy of silence may be adopted only after a reasonable investigation for mitigating evidence or a reasonable decision that an investigation would be fruitless." *Id.*; see also Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986) (client's request not to use mitigating evidence should stop investigation only if client shows that investigation would be fruitless or harmful), cert. denied, 481 U.S. 1042 (1987). In addition. counsel had more than a cold record here. Even if in 1982 an initial duty to investigate only extended to a defendant's parents, as counsel testified, once counsel was made aware of the possibility of child and spousal abuse, he certainly had a duty to investigate further.

The high degree of relevance of this information required counsel to pursue it. The court finds the abuse of defendant's mother particularly compelling mitigating evidence in a rape case. Petitioner's counsel had the opportunity to show that petitioner grew up seeing his mother regularly and violently abused by men. Petitioner's crimes all involved violence against women. A jury was likely to find this information helpful to understanding petitioner's criminal behavior. Given the dearth of any substantial mitigating evidence at hand,

counsel was required to pursue the abuse issue through other family members, neighbors, and friends.

If petitioner's counsel had approached family members who were close to petitioner and his mother at the time she was married to James Sr. and to Courtney Jones, he would have discovered additional evidence of abuse. Petitioner has presented substantial testimony that James Sr. emotionally and physically abused Marie. Marlene Younger, Mrs. Jones's sister-in-law, knew that James Sr. treated Marie badly. Younger Decl., ex. 37, ¶ 14. She also testified that she cared for petitioner often when he was young. She noticed that after visits with his father, petitioner "seemed different: he was hard to control, easily upset, and cried a lot for no apparent reason." Id. ¶ 15. Dona Williams, Mrs. Jones' sister, testified that she heard from her mother that James Sr. "was always beating Marie up." Williams Decl., ex. 36, ¶ 42. Tom Karis, James Sr.'s brother, recalled that "Jim was violent with Marie, and I saw her with black eyes and bruises many times." T. Karis Decl., ex. 20, ¶ 57.

Mrs. Jones' evidentiary hearing testimony revealed the extent of the brutality she suffered. While petitioner's counsel testified that Mrs. Jones denied being physically abused, there is no indication that counsel attempted to explain the importance of that testimony to her. Mrs. Jones explained that she would have testified about the abuse if petitioner's attorneys had asked her to do so. E. Jones Decl., ex. 16, ¶ 107. Counsel should have investigated and substantiated the abuse to

convince Mrs. Jones to testify. At the evidentiary hearing Mrs. Jones testified about her frighteningly abusive relationship with James Sr.:

> Jim did not want me to have our baby. Although abortion was illegal at the time, he pressured me to get one. One day, he told me that he had a friend who was a police officer, who could get me some pills to make me miscarry. Jim took me to a pharmacy with him and his friend, and made me take two pills his friend brought out. Jim was furious when I did not miscarry, but about six weeks later, I started hemorrhaging. I bled for several days, and then it tapered off. I was terrified, and the doctor told me I had to stay in bed for at least two months . . . .
>
> When Jim and I were dating, he was loud and liked to party, but he also was real sweet to me. From the beginning of our marriage, things changed. Jim became physically violent, emotionally abusive, moody, jealous, and controlling. Although he was in the service for some of my pregnancy, for the first two months of our marriage, and for several years after our son was born, Jim made my life a living hell.
>
> . . . .
>
> Jim became obsessed with controlling me. He used to say to me, "I want to know every place you go

and who you go with. I want to know exactly when you get off work, and where you go when you get off. I even want to know when you go to the bathroom." . . . Jim told me that if he ever saw me smoking a cigarette, he'd "knock it clear down [my] throat." Once, I was so sick of his rules that I decided to do it anyway, and I took one of his Camels and started to light it up right in front of him. I had not even lit the cigarette before Jim grabbed it from me. He then made me swallow it whole, just like he had promised. I gagged and coughed but did not dare oppose him.

Jim was physically abusive towards me for years. I lived in fear of Jim throughout our marriage, and for several years after our divorce as well. He threatened to kill me and I knew he not only could but would if I crossed him. He had an unpredictable temper, and when I said something that angered him, he turned and slapped me with the back of his hand. When he was mad, Jim hit me and knocked me around the room, throwing me from wall to wall as if I were a ball on a pool table. I tried to fight back, but I was only 105 pounds in those days, so there was not much I could do. Once, I threw a high-heeled shoe at him, which cut him in the arm, but then Jim grabbed the shoe and used it on me over and over, making sure the high heel dug into my skin. I begged him to stop beating me, but he was beyond reason once he started hitting me. All I could do was cover up my

head and cower while he beat me with the shoe. Baby Jimmy was present during almost all these fights, especially when the three of us lived in the Cancillas' one-room shack.

For a long time, Jim made me feel awful about myself. Sometimes he took one bite of the dinner I had cooked, told me it was "no good," and dumped it on the floor. He would then announce he was going to his mother's house to eat, leaving me and the baby with no food at all . . . .

. . . .

In August, 1953, when Jimmy was nineteen months old, I decided I could not put up with Jim's cruelty any longer. The last straw was when Jim told me he wanted me to go to work for him as a prostitute . . . . Soon afterwards, I moved out of the house . . . .

I filed for divorce from Jim in October, 1953, and our divorce became final in November 1954, when Jimmy was three years old. Even then, however, Jim was not out of my life. For almost two years after we separated, Jim threatened and intimidated me. He begged me to take him back. He parked his car outside my apartment and stared at my window for hours. He started following me to and from work, and leaving "reminders" to let me know

> he was watching me . . . .
>
> There was little I could do to stop Jim from stalking and threatening me. At one point, I even switched apartments with a couple to try to shake Jim. Once I got in my car and he followed me on a high-speed chase all over town. I was afraid he'd kill me.
>
> Jim also continued to beat me after our separation. We had loud, awful fights, and Jimmy was often there during them. I remember one time when Jim threatened to take Jimmy from me and never let me see him again, and I had to pull little Jimmy, crying, from Jim's arms.

E. Jones Decl., ex. 16, ¶¶ 38-50.

Investigation would also have revealed evidence that petitioner's mother was frequently beaten by her next husband, Courtney Jones. Marlene Younger testified that she knew Courtney was beating Marie. Younger Depo. at 64:7 - 65:7. Robert Pullin, who was married to Cora Lee, testified that:

> Courtney was a heavy drinker who mistreated Marie. He was physically violent with her, and it seemed like he was most likely to hurt her the day after he had been out drinking. Courtney hit Marie and knocked her down, and I often saw her with black eyes and

> bruises all over her body. Everyone in the family knew that Courtney beat Marie, but back then, these kinds of things were kept quiet, and people did not intervene to stop of the abuse the way they do today.

Pullin Decl., ex. 28, ¶ 2. Dona, Marie's sister, reported that Courtney "beat Marie a lot" and remembered one day:

> when she came to my house with two black eyes and bruises all over her face. Marie told me that Courtney had hit and punched her. She also said he had kicked Kevin across the room, and Kevin was only two years old at the time.

Williams Decl., ex. 36, ¶ 42.

Mrs. Jones testified in detail about her relationship with Courtney Jones:

> I married my fourth husband, Courtney Jones, in 1956. Courtney was the brother of my sister-in-law, Marlene Howell. We were married in May, 1956, when Jimmy was four and a half years old, and divorced in March, 1961, when Jimmy was nine and a half. Courtney and I had a son, Kevin, who was born in November, 1957.
>
> Courtney, like Jimmy's father, started out sweet, but became violent after we were married. The first

time he beat me was when Kevin was a baby. I had had a long day at work and I was exhausted, and had gone to bed with Courtney that night. While we were lying in bed, Kevin started crying, and nothing I did quieted him. I remember standing over his crib, shaking it, and begging him, "Please, please, just stop crying!" Suddenly Courtney jumped out of bed, grabbed me, and threw me on the floor. Then he sat on top of me, pinned me down, and hit me all over with his hands and fists.

[F]rom the first time he hit me until the end of our marriage, we were caught up in an exhausting cycle of violence. Like Jimmy's father, Courtney was insanely jealous. He beat me when he suspected me of being unfaithful, and for dozens of other reasons. Unlike Jim, however, Courtney usually felt sorry once the beatings were over. I left him so many times I cannot remember them all, and each time, Courtney apologized and begged me to take him back, promising never to hurt me again. After we reunited, things between us were good, sometimes for weeks or months at a time. Yet the peace never lasted for long before the beatings began again. I could tell when the tension was mounting in between attacks, and I tried to do everything to placate Courtney to keep him from attacking me. I especially tried to keep Jimmy as invisible as possible so Jimmy would not upset Courtney.

Courtney was an alcoholic. He drank beer steadily, and almost always had a can of it in his hand. Courtney worked as a truck driver, and when he was home for a few days or weeks between jobs, his drinking was at its worst. When Courtney beat me, he was usually, but not always, drunk, or else he was coming down from a drinking binge.

Courtney had a particular style of beating me. The most common thing he did was hold me close to him--either by grabbing my clothes or pinning me against a wall--and punch me over and over. He also kicked me, threw me down, and threatened to kill me. One threat Courtney used before he lit into me was, "I'11 make you wish you were dead." Lots of times, he made me feel so powerless and afraid that I did want to die. At other times, I got mad and tried to fight back and protect myself. I threw things at him, kicked him, and did anything else I could to get him away from me.

Courtney followed me when I left the house, and told me when, where, and with whom I could go out. When I worked nights at a fast-food restaurant, Courtney often put the boys in the car, drove to the restaurant, and parked outside for hours while he watched me. One night, I got so sick of Courtney's rules that I decided to do something I knew would make him furious. I left the kids at home and went

down to San Jose with a cousin of mine whom he despised, one he always called "your no-good whore of a cousin." When we got back to Richmond, I told my cousin that I wanted to go to a bar and stay out just as late as Courtney had the night before. We did just that, even though I was so tired that I vomited as we left the bar and could barely stay awake on the way home.

When I got to our house, Courtney was in the bedroom with Kevin and Jimmy. He came out of the room and beat the living daylights out of me. He dragged me from room to room, punching me and throwing me against the walls. When we got to the kitchen, he threw me on the floor, picked up a trash can full of garbage, and dumped it all over me. While I lay there, he yelled, "Now take your damn kids and get out of my house!" For days afterwards, I had bruises all over my body, two black eyes, and I could hardly walk for a week.

I hated for my boys to see Courtney's violence, so I tried to keep them in their bedrooms while the fights were going on. Sometimes, though, I was so afraid for my own safety that I did not even know where Kevin and Jimmy were. Courtney was 6'2", so even when I fought back, there was not much I could do. He also knew that he could get to me by hurting Jimmy. If I told Courtney to stop calling Jimmy

names or whipping him, it just made things worse. I told Courtney to stop picking on Jimmy when I was at home, but in those days I sometimes had to work nights, weekends, or both. Since Courtney worked off and on as a truck driver, he was often alone with the boys while I was at work and was free to do whatever he wanted. In many ways the boys and I were his prisoners, and he controlled everything we did.

Probably the worst point in my marriage to Courtney came while we lived in El Sobrante. Courtney was beating me more frequently and more viciously than ever before, and to make matters worse, my father was living with us for several months. We had no extra space in our house, and Daddy had to share a room with Jimmy. I hated having him there, but he was suffering from emphysema and we had no choice but to take him in . . . . While he lived with us, I could hardly think straight; I just wanted him out of our lives. Having my father in the house reminded me constantly of what he had done to my sisters and how he had molested them. It gave me nightmares and made me jump when he waled in on me. I was a bundle of nerves.

E. Jones Decl., ex. 16, ¶¶ 38-75.

Marie and Courtney separated when petitioner was nine years old. Marie alleged extreme cruelty as the grounds for her divorce from Courtney. Divorce Petition, ex. 148.

Mrs. Jones testified that after her divorce, she was unable to care for Kevin, who was then three, and petitioner, who was ten years old. E. Jones Decl., ex. 16, ¶ 78. Because of this, petitioner and Kevin lived with Marlene, Jack, and Danny for nine and a half months after the divorce. Id.; Younger Decl., ex. 37, ¶ 19.

Reasonable investigation would also have revealed what petitioner's counsel admits he suspected, that petitioner himself had been beaten by his father and stepfather. See Owen Depo. at II:47:25. Mrs. Jones testified that she was alarmed by the injuries petitioner received during his visits to James Sr. after the divorce. E. Jones Decl., ex. 16, ¶ 52. Once when petitioner was four years old, he returned from a visit with a circle-shaped burn on his hand. Id. ¶ 52. James Sr.'s half-sister Celia Parks also testified that she was there when James Sr. returned with petitioner. She recalls that "little Jimmy was crying uncontrollably, because he had a burn on his hand." Parks Decl., ex. 25, ¶ 5. James Sr. also admitted to Anthony Cancilia, his half-brother, that he had sexually molested petitioner, felt ashamed about what he had done, and hoped that petitioner did not remember the abuse. A. Cancilia Decl., ex. 4, ¶ 6. Mrs. Jones testified that she had reason to suspect James Sr. was abusing petitioner after their separation:

> Jimmy continued to see his father for regular visits, almost every single weekend, after our divorce. Jimmy's behavior seemed strange after these visits with his Dad. When he was just two or three years old, Jimmy began to call me curse names that he was too young to understand himself. I will always believe that Jimmy's daddy trained Jimmy to call me those slurs. After almost every visit with his father, Jimmy had some kind of injury--bruises on his legs, or something else that "hurt" him. Once, at age four, Jimmy came back from seeing his father with a circle-shaped bum on his hand. Jim told me that it was caused by his girlfriend, who had accidentally burned Jimmy with a car cigarette lighter. This incident, combined with the fact that Jim had not paid a dime of child support for the past two years, made me furious. I told Jim that he would not be allowed to see his son anymore until he started paying what he owed. After that, I refused to allow Jimmy to visit with his father for over ten years.

E. Jones Decl, ex. 16, ¶ 52.

Courtney Jones also abused petitioner. Marie testified:

> Courtney adored Kevin. He treated him like a king, doting on him and spoiling him. But Jimmy never got any of Courtney's love. Courtney never treated Jimmy like a son, and called him "you little

> wop" more often than he called him by his name. He also tried to turn my two boys against each other. If Jimmy and Kevin were happily playing together, Courtney would step in, take Jimmy away, and make him sit still against a wall to watch while Kevin played with all the toys himself. When Jimmy disobeyed, Courtney whipped him with his leather belt. Yet if I so much as threatened to whip Kevin for something he had done wrong, Courtney got furious with me. Lots of times he came home from work, picked up Kevin, and asked him, "Did your Mama whip you today?" and "What did that little wop get away with today?" To Courtney, Kevin was a little god, but Jimmy was just a "stupid wop kid."
>
> Courtney punished Jimmy when Kevin told on him and rewarded Kevin. Courtney used his big trucker's belt to beat Jimmy black and blue. Jimmy was scared to death of Courtney because of all the beatings, whippings, and threats.

E. Jones Decl., ex. 16, ¶¶ 65 and 66.

The Ninth Circuit has noted that in prior Supreme Court and Ninth Circuit cases where failure to offer mitigating evidence was found reasonable, counsel determined the evidence would have opened the door to damaging rebuttal. Mak v. Blodgett, 970 F.2d 614, 618 (9th Cir. 1992), cert. denied, 507 U.S. 951 (1993). Such a tactical evaluation was

absent in Mak and is similarly absent here. There does not appear to have been any risk in presenting the mitigating evidence of abuse. In addition, there is no indication that conducting a further investigation of abuse was not possible. There is no showing that counsel lacked the time or money to conduct further investigations.[27/] "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Petitioner's trial counsel has provided no rational justification for his failure to pursue an investigation into petitioner's history of family abuse. Accordingly, the court finds counsel's assistance unreasonable under the Sixth Amendment.

Petitioner also alleges counsel was ineffective for failing to investigate and present a complete picture not only of petitioner's immediate family but of petitioner's extended family. Petitioner has presented a large body of information tracking petitioner' s extended family's history of mental illness, substance abuse, psychological and physical abuse, and abandonment. The court finds that counsel in 1982 was not constitutionally compelled to do the extent of family history research that petitioner's counsel now presents. While delving into a petitioner's ancestral history may have been preferred and may have proven fruitful, this court finds, considering the facts of this case and the state of the law at that time, that reasonably competent counsel was not constitutionally required to pursue

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27. Counsel did not request a continuance of the penalty phase to conduct further investigations.

such an investigation.

The standard for assessing whether counsel's conduct prejudiced petitioner is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." Id. at 694. The Ninth Circuit has described the sentencing determination as more than a mechanical weighing of aggravating and mitigating factors:

> The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited place.

Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996). The court in Hendricks noted that the law is "sensitive" to failures in the penalty phase of a capital case. Id.

After deciding not to put on Dr. Globus, petitioner's

counsel was left with little of consequence to present in mitigation. The only mitigating evidence concerned petitioner's artistic ability, his intelligence, and some limited testimony concerning his youth. RT 2510-16, 2520-33. Counsel put on no mitigating evidence of mental illness but argued that the criminal acts at issue were themselves evidence that petitioner was troubled. RT 2579-80.

In his penalty phase argument, the prosecutor repeatedly stressed the absence of any testimony of mental illness or hardship:

> The fourth factor is whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. There is not one shred, not one scintilla, not one thimbleful of evidence before you that Mr. Karis suffers from any type of psychiatric or psychological malfunction. This is not a case where psychiatrists came in and presented evidence as to the dynamics of Mr. Karis.
>
> . . . .
>
> I tell you that this is not a case that was shrouded in psychiatric mystique where persons with medical and forensic degrees appeared before you and told you that the reason that Mr. Karis did these things was because he was under some duress or domination of

> another person. Mr. Karis is not a lunatic. Mr. Karis is not diminished. Mr. Karis is bright. Mr. Karis is cunning, and Mr. Karis well knew exactly that which he was doing.

RT 2563:4-10; 2564:22 - 2565:3.

The prosecutor argued strenuously that petitioner had failed to present any evidence to attempt to explain petitioner's conduct:

> [W]e see Mr. Karis, not as an impoverished individual, not somebody who was void of talents, who's devoid of intellectual capacity, not somebody who, by virtue of being so poor as an individual, so lacking in ability was warped into being a killer. No, on the other hand, Mr. Karis has all of the ability, but he changed his life into that of visiting evil destruction and death on fellow human beings. . . [D]espite Mr. Karis' abilities, despite his intellectual capacity, despite all of his talents, he has turned to base and immoral purposes. He grows marijuana for profit. He rapes for pleasure, and he kills to avoid apprehension.

RT 2568:8-14; 2569:5-9.

As described in detail above, had counsel performed a proper investigation he could have offered substantial and

wrenching evidence of petitioner's violent and abusive childhood. If this evidence had been offered at trial, it is likely that jurors would have concluded that petitioner witnessed his father and stepfather viciously beat his mother; that both men also beat and abused him; and that petitioner's father molested him. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Boyde v. California, 494 U.S. 370, 382 (1990). Thus, it is reasonable to expect that some jurors would have found this evidence especially important in understanding a defendant who had acted violently toward women. Considering the weak mitigation case put on, the prosecutor's focus on the lack of evidence of mental illness, and the strength of the evidence of abuse presented here, the court finds a reasonable probability that had counsel properly investigated and presented evidence of abuse, the result of the penalty phase would have been different. The court will recommend granting the petition for a writ of habeas corpus on this basis.

2. Failure to Investigate Drug Use

With respect to petitioner's drug use, penalty phase counsel said his sources revealed that petitioner stopped using methamphetamine after military service. Owen Depo. at III:44:4-15. However, counsel recalled that Mrs. Jones told him she felt petitioner had been using drugs. Id. at III:48:11-15. Petitioner denied any drug use after that time. Id. Interestingly,

to establish his drug use here, petitioner relies primarily on his experts' descriptions of the drug use and its effects. The experts declarations are based almost solely on interviews with petitioner. Yet, petitioner refused to reveal this alleged drug use to either trial counsel. Counsel cannot be charged with a duty to investigate where a reasonable initial investigation indicates no further investigation is necessary. See Clark v. Collins, 956 F.2d 68, 72 (5th Cir.) (since attorney had no information indicating petitioner might have been mentally ill, not incompetent for failing to investigate petitioner's mental condition), cert. denied, 503 U.S. 901 (1992).

Furthermore, petitioner has not demonstrated prejudice with respect to this issue. Petitioner states that in addition to petitioner's mother, counsel should have questioned Danny Howell, Gary Milter, Bob Baker, David Marden, and Jay Raugust regarding petitioner's drug use. However, Mrs. Jones testified only that she had a feeling petitioner was using drugs around the time of the present incident, but that she did not know for sure. 1995 E. Jones Depo. at 6869. Danny Howell, Gary Milter, and Bob Baker may have all been able to testify to petitioner's history of drug and alcohol use. Danny Howell testified to petitioner's heavy drinking as a teenager and testified that he was aware petitioner used drugs at that time. Howell Decl., ex. 14, ¶ 14. Milter testified to using drugs with petitioner in the 1960's. Milter Decl., ex. 23, ¶ 7. Baker knew of petitioner's heavy drinking when petitioner was a teenager. Baker Decl., ex. 1. at 3-4. Petitioner lived with Baker in Anaheim after he was discharged from the military early in

1970. Id. at 2. However, Baker does not describe any drug use by petitioner during that time. Id. Penalty phase counsel understood petitioner's drug use to have ended eleven years before the crime. While petitioner's teenage substance abuse would have been relevant mitigating evidence, it is not so important that its absence prejudiced petitioner at the penalty phase.

The most compelling evidence of drug use would have been to describe state of mind at the time of the 1981 rape and murder. Howell, Milter, and Baker were not with petitioner during that time period. Similarly, Marden would testify only as to petitioner's use of alcohol and marijuana during 1981. ET 13-21-22, 25-28. Of those identified by petitioner, only Raugust, and petitioner himself, could have testified to petitioner's heavy drug use in 1981 and to the alleged drug "run" during the Fourth of July weekend preceding the 1981 rape and murder. See Raugust Depo., ex. 30, at 8:23 - 10:16. However, Peggy Steuben testified during the guilt phase that petitioner and Raugust did not engage in significant alcohol use or any drug use on that weekend. RT 1779:4-10. In addition, if penalty phase counsel had investigated he would have also encountered those who did not notice serious drug use in 1981. Petitioner's parole agent, Allen Addison, testified that he never had any reason to believe petitioner was involved with controlled substances. ET 12-203 - 204. Petitioner's neighbor at the time, David Marden, testified that he and petitioner smoked marijuana and drank together but that he never saw evidence of intravenous drug use. ET 13-21-22, 25-28.

Marden's wife, Pattie, testified similarly. ET 13-68-70. Victoria Enyart, a shop owner who sold some of petitioner's artwork, also testified that she saw no evidence of drug use. Enyart Depo. at 38:2-5.

Even if counsel had interviewed Raugust, petitioner has only shown that Raugust would have said that he saw petitioner inject speed "many times" in 1981 and that he and petitioner took speed over the Fourth of July weekend. Raugust Depo., ex. 30, at 8:23 - 10:16. Raugust has not testified to the extent of their drug use on that weekend. To have obtained the evidence to support a theory of methamphetamine psychosis and withdrawal,[28] counsel would have needed petitioner to describe his drug use. Yet petitioner did not tell counsel about

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28. Dr. David Smith, a physician and founder of a drug abuse treatment facility, testified that petitioner suffered from a methamphetamine psychosis and withdrawal during the days preceding the crime. Smith Decl. ¶ 25-30. Smith testified that during that time petitioner would have been subject to delusions, hallucinations, paranoia, distorted thinking, and loss of contact with reality. Id. ¶ 30. Smith's information on petitioner's drug use is based almost solely on his interviews with petitioner, who did not reveal this information to counsel. Id. ¶ 8, 25. While Smith also reviewed petitioner's records and the declarations submitted here, as discussed above, with the exception of Raugust's brief description of petitioner's 1981 drug use, the other information deals with petitioner's prior drug use. Id.

the drug use. Furthermore, petitioner has not shown what counsel should have done to convince petitioner to open up. Even if counsel had spoken to Raugust, the record does not show that he would have understood what is now alleged to have been the extent of petitioner's 1981 drug use. Therefore, counsel would not have had the kind of understanding of the important facts necessary to try to convince petitioner to discuss the matter further. I n sum, petitioner has not demonstrated that even if counsel had conducted a further investigation he would have obtained the evidence presented now. Petitioner has shown neither unreasonable conduct nor prejudice under Strickland.

3. Failure to Present Evidence Of Mental Illness

Counsel made a determined effort to obtain evidence of any mental illness. Tapson hired Dr. Globus, a psychiatrist and neurologist, to make a determination of petitioner's mental state. As discussed above, both trial counsel then made a reasoned decision not to use Dr. Globus' report. However, penalty phase counsel had also hired Drs. Hutchinson and Whipple to do psychiatric and psychological assessments of petitioner. Owen Depo. at II:90:16-19. Counsel did not have Hutchinson or Whipple prepare written reports because he felt they had little good to say about petitioner. Owen Depo. at IV:16:4-18. Petitioner apparently told Hutchinson and Whipple that he might escape and take hostages. Id. at IV:17:2-4. Whipple reported to counsel that he felt personally threatened by petitioner's remarks. Id. at IV:19:1 1-14. Counsel felt that

petitioner made those comments to Hutchinson and Whipple to subvert the examination process because he felt the penalty phase was useless. Id. at IV:40:26 - 41:10. Counsel also considered putting on Dr. Kim, a prison psychologist. Id. at IV:55:23 - 56:2. He decided against it because Kim believed petitioner's story, which he appeared to tell for the first time, that petitioner had dated the victim of the 1976 crime. Id. at IV:58:22 - 59:4. Kim's report also failed to recognize the 1974 escape attempt. Counsel felt Kim would be open to cross-examination for his statement that petitioner had not been a disciplinary problem while in prison. Id. at 59:22-26.

Petitioner also complains that counsel erred by failing to provide these doctors with background material on petitioner. The Ninth Circuit has specifically held that counsel has no such duty:

> "In the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client." Requiring the attorney to gather such information "would defeat the whole aim of having experts participate in the investigation."

Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995) (quoting Bloom v. Vasquez, 840 F. Supp. 1362, 1370 (C.D. Cal. 1993)), cert. denied, 116 S. Ct. 1335 (1996).[29/] Petitioner relies

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29. Petitioner's Strickland expert opined to the contrary.

upon Clabourne v. Lewis, 64 F.3d 1373, (9th Cir. 1995). In Clabourne, the circuit court held that counsel did not adequately prepare his experts because he failed to provide them with existing statements and records. 64 F.3d at 1385. The Clabourne court did not hold that counsel has an obligation to investigate and provide his mental health experts with previously undeveloped information. Consequently, Clabourne is not on point.

Petitioner has presented evidence that petitioner suffered and suffers from Post Traumatic Stress Disorder, Dissociative Amnesia, other dissociative symptoms seen in victims of severe abuse, and severe depression. On the one hand, Globus' analysis and petitioner's conduct toward Hutchinson and Whipple did not negate further attempts to obtain a psychiatric opinion. On the other hand, when confronted with an uncooperative client, counsel cannot be expected to repeatedly reinvestigate what appears to be an unproductive line of defense. Although further effort by counsel might have yielded a better result, counsel's effort fell within the wide range of reasonable assistance described in Strickland.

He stated that counsel had a responsibility to provide Globus with a full), developed family history and other background information. Nolan Depo. at 136:8-14.

4. Failure to Present Evidence of Military Record

Penalty phase counsel had obtained petitioner's military records. Owen Depo. at IV: 109:3-5. According to counsel, those records revealed that petitioner, then a teenager, agreed to enter the military instead of being committed to the California Youth Authority for an armed robbery. Id. at III:44:22 - 45:5. While in the service, petitioner was found guilty of being AWOL. Id. Petitioner worked to get an honorable discharge from the military. Id. Petitioner was using methamphetamine during his service. Id. at III:48:20-25. Counsel testified that he felt jurors might or might not consider the drug use mitigating and determined petitioner's military record was, on the whole, more aggravating than mitigating. Id. This was a reasoned, tactical decision.

5. Trial Court Consideration of Probation Report

Petitioner also alleges in claim 8 that counsel was ineffective for failing to object to the trial court's consideration of a probation office report. That report contained, among other things, statements attributed to the surviving victim that "she will continue to live with the memory of the events of that day throughout her life," and that "she continues to fear darkness, strangers, and to be left alone for any significant period of time." CT 1138-39; RT 2546-48. Petitioner alleges that state law prohibited the trial court from considering these issues. Whether or not counsel was constitutionally required to object, petitioner has not shown a reasonable probability that, had

counsel objected, the trial court would have overturned the jury's death verdict. This claim should be denied.

P. Absence of Evidence of Petitioner's Neurological Disorders - Claim No. 18

Petitioner alleges that his death sentence was unreliable because the jury did not have before it evidence of petitioner's neurological disorders. Although the petition alleges facts regarding petitioner's childhood illnesses and accidents, petitioner has never presented evidence to support either these background facts or a conclusion that they caused petitioner to suffer neurological damage. Accordingly, claim no. 18 should be denied for lack of factual support.

Q. Unadjudicated Prior Criminal Activity - Claim No. 19

Petitioner claims that the trial court erroneously permitted the jury to consider evidence of petitioner's unadjudicated criminal activity. Pursuant to California Penal Code § 190.3(b), the trial court instructed the jury to take into account "the presence or absence of criminal activity by the defendant, which involved the use or attempted use of force or violence, or the express or implied threat to use force or violence." RT 2594:15-22. The prosecution presented evidence of petitioner's involvement in the following unadjudicated criminal activity: (1) kidnapping the women and baby in Sonoma County; (2) attempting to rape one of those women at

knife-point; (3) assaulting and threatening to kill the other woman; (4) demanding the mobile home owner's car keys at knife-point; and (5) aiding and abetting the rape of his 1971 victim by another assailant.

Petitioner argues that reliance upon unadjudicated criminal activity during the penalty phase of a capital case violates the special due process and Eighth Amendment reliability requirements of the Constitution. Petitioner further contends that his equal protection rights under the Fourteenth Amendment were violated by the use of this evidence because California does not allow the use of unadjudicated offenses in non-capital sentencing. Petitioner finally claims that even if it is constitutional to consider evidence of unadjudicated criminal activity, the trial court did not provide adequate instructions for evaluating such evidence.

1. Evidence of Unadjudicated Criminal Activity

Petitioner alleges the introduction of evidence of unadjudicated criminal activity violated his due process rights and right to a reliable sentence under the Eighth Amendment. The three circuits that have addressed this issue have found no constitutional b..r.[30/] The Tenth Circuit held that evidence at the

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30. The Ninth Circuit has ruled that a capital sentencer may rely on uncharged and untried offenses. Coleman v. Risley, 839 F.2d 434, 505 (9th Cir. 1988). However, that opinion was withdrawn and decided on other grounds upon

penalty phase of unadjudicated crimes does not violate due process. Hatch v. Oklahoma, 58 F.3d 1447, 1465 (10th Cir. 1995), cert. denied, 116 S. Ct. 1181 (1996). The court relied, in pan, upon Williams v. New York, 337 U.S. 241 (1949). In Williams, a capital case, the Court held that the Due Process Clause does not preclude the sentencing judge from considering evidence of prior criminal conduct not resulting in a conviction. 337 U.S. at 459. In recognizing later that death is different from other forms of punishment, "[t]he Court . . . discredited some of the logic that undergirded its decision in Williams." Hatch, 58 F.3d at 1465 (citing Gardner v. Florida, 430 U.S. 349 (1977)). The Court in Gardner held that the death penalty may not be imposed based on information which the defendant has no opportunity to deny or explain. 430 U.S. at 362. Petitioner here makes no allegation that he lacked an opportunity to refute the evidence. Further, the Court in Gardner did not call into question "the essence of Williams holding -- that a judge's consideration of evidence of unadjudicated crimes in imposing the death sentence does not violate a petitioner's due process rights." Id. (citing Nichols v. United States, 511 U.S. 738 (1994)(uncounseled misdemeanor conviction may be used as enhancement)).[31]

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rehearing en banc. Coleman v. McCormick, 874 F.2d 1280 (9th Cir.), cert. denied, 493 U.S. 944 (1989).

31. Recently the Court went even further by ruling that, in sentencing, a federal trial judge may consider conduct of the defendants underlying charges of which they had been

Similarly, the Fifth Circuit has held that the admission of unadjudicated offenses does not violate the Eighth or Fourteenth Amendments. Williams v. Lynaugh, 814 F.2d 205, 208 (5th Cir.), cert. denied, 484 U.S. 935 (1987). Evidence of unadjudicated crimes is relevant to the jury's task of determining whether there is a probability a defendant will continue to commit acts of violence. Id. Evidence of unadjudicated crimes at the penalty phase is not per se unconstitutional. See Devier v. Zant, 3 F.3d 1445, 1464 (11th Cir. 1993), cert. denied, 115 S. Ct. 1125 (1995). The question at the penalty phase is whether that evidence is reliable. Tucker v. Kemp, 762 F.2d 1480, 1487 (11th Cir. 1985) (citing Zant v. Stephens, 462 U.S. 862, 863 (1983)), vacated, 474 U.S. 1001 (1985), reinstated, 802 F.2d 1293 (11th Cir. 1986), cert. denied, 480 U.S. 911 (1987). As long as the defendant is given a fair opportunity to refute the evidence, the jury may make that reliability determination.

Petitioner also makes an equal protection challenge. He alleges that the California sentencing scheme violates equal protection by permitting the introduction of unadjudicated conduct in capital cases but disallowing such evidence in non-capital sentencing. As petitioner acknowledges, the statutory scheme is constitutional here if it has a rational relationship to a legitimate government objective. See Williams v. Lynaugh,

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acquitted. United States v. Watts, ___U.S. ___,117 S. Ct. 633,136 L. Ed. 2d 554 (1997). As in Nichols, the Court cited Williams in support of its holding.

814 F.2d at 208. There is a strong interest in ensuring that all relevant evidence concerning the capital defendant is placed before the jury. Id. Further, the substantial differences between the capital sentencing system and the system for sentencing noncapital crimes justify the use of different information in each system.[32/] Accordingly, the court finds no equal protection violation. See id.

A few state courts have held that evidence of unadjudicated offenses violates the federal Constitution. See State v. McCormick, 397 N.E.2d 276, 279-80 (Ind. 1979); State v. Bartholomew, 683 P.2d 1079 (Wash. 1984). The court does not find the analysis in those cases convincing. In fact, the court in McCormick, relied in part upon Gardner. As discussed above, Gardner only challenged the procedure permitted in Williams; it did not overrule Williams' holding that evidence of unadjudicated crimes is appropriate.

This court will recommend denial of petitioner's Eighth and Fourteenth Amendment challenges to the evidence of unadjudicated crimes presented at the penalty phase.

2. Jury Instructions for Unadjudicated Offenses

The jury was instructed that before it could consider

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32. The differences between the capital and noncapital sentencing systems are discussed in more detail below with respect to claim no. 29.

a particular aggravating circumstance, it must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt. The trial court then instructed the jury on the definition of reasonable doubt. RT 2599:15-25. Petitioner argues the instructions were not adequate because the instructions did not define the elements of the unadjudicated violent crimes and did not explain the need to find each element proven. Furthermore, petitioner claims that no instruction was given to advise the jury that unadjudicated criminal activity could be weighed in aggravation only with a unanimous finding that petitioner committed the alleged crime.

Instructional error is generally a matter of state law which is not cognizable on habeas corpus unless it rises to the level of a violation of fundamental fairness. Estelle v. McGuire, 502 U.S. 62, 67 (1991). A petitioner is not entitled to an instruction, at the sentencing phase, that he or she is presumed innocent of unadjudicated crimes that are being considered as aggravating factors. Delo v. Lashley, 507 U.S. 272 (1993). The presumption of innocence operates at the guilt phase to remind the jury that the State has the burden of establishing every element of an offense beyond a reasonable doubt. Id. at 278. Once a defendant has been convicted fairly in the guilt phase of a capital trial, the presumption of innocence disappears. Id. As in Delo, the jury here was specificall), instructed that the state had the burden of proving any aggravating circumstance beyond a reasonable doubt. Id. at 279; RT 2599.

Ninth Circuit authority requires rejection of

petitioner's contentions that the instructions failed to require the jury to find each element proven. In Williams v. Vasquez, the court dismissed a vagueness challenge to § 190.3(b). The court upheld the district court's finding that it is unnecessary to instruct the jury as to the discrete criminal offenses to be considered, the elements of said offenses, or the standard of proof which must be met before the jury may consider such offenses. Williams v. Vasquez, 817 F. Supp 1443, 1470-71 (E.D. Cal. 1993), affd, 52 F.3d 1465, 1481 (9th Cir. 1995), cert. denied, 116 S. Ct. 937 (1996).

Furthermore, the Constitution does not require jury unanimity on aggravating factors in the penalty phase of a capital case. Bonin v. Vasquez, 794 F. Supp. 957, 989 (C.D. Cal. 1992), aff'd, 59 F.3d 815 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996). The Supreme Court has only held that the capital sentencing proceeding must meet some of the requirements of a criminal trial, such as the right to counsel. Id. (citing Bullington v. Missouri, 451 U.S. 430, 446 (1981)). The Court has not held that jury unanimity on the determination of aggravation is a constitutional requirement. Id. at 989 (citing Briley v. Bass, 584 F. Supp 807, 819 (E.D. Va.), aff'd, 742 F.2d 155 (4th Cir.), cert. denied, 469 U.S. 893 (1984)). Each juror need not agree which factors are aggravating. Id. at 989. Constitutional concerns are met when each juror agrees that the aggravating factors outweigh the mitigating factors. Id.

Failure to instruct the jury of the elements of the unadjudicated crimes, the need to find each element proven, and

the requirement of a unanimous finding did not violate petitioner's right to a reliable and fair capital sentencing determination. Therefore, this court finds that the trial court's instructions did not violate constitutional standards.

R. Jury Instructions with Inapplicable Statutory Mitigating Factors - Claim No. 20

Petitioner claims that the trial court erred in giving the penalty phase instructions because nothing in the instructions identified which of the listed factors were aggravating and which were mitigating. Trial counsel moved to exclude the statutory mitigating factors which were factually inapplicable to the case.[33/] The trial court denied the motion. RT 2407. Petitioner argues that an instruction patterned on California

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33. Trial counsel moved to exclude the following factors:

e) whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

f) whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

g) whether or not the defendant acted under extreme duress or under the substantial domination of another person;

j) whether or not the defendant was an accomplice to the offense, and his participation in the commission of the offense was relatively minor. CR 852-54.

Penal Code § 190.3's list of sentencing factors is ambiguous because it does not explain which factors are aggravating and which factors are mitigating. Therefore, the jury may have used inapplicable mitigating factors as aggravating factors.

The Supreme Court has held that a capital sentencer need not be instructed how to weigh any particular fact in a capital sentencing decision. Tuilaepa v. California, 512 U.S. 967 (1994). In Tuilaepa, the petitioner claimed that a single list of factors was unconstitutional because it did not guide the jury in evaluating and weighing the evidence and allowed the prosecution and the defense to make wide-ranging arguments about whether the defendant deserved the death penalty. Id. The Court held that the discretion to evaluate and weigh circumstances relevant to a particular defendant and the crime he committed is not impermissible in the capital sentencing process. Id.

Jury instructions listing all the aggravating and mitigating factors from § 190.3 do not violate due process. Williams v. Vasquez, 817 F.'Supp. 1443, 1484-85 (E.D. Cal. 1993), aff'd, 52 F.3d 1465, 1481 (9th Cir. 1995), cert. denied, 116 S. Ct. 937 (1996). In Williams, the petitioner challenged the trial court's instruction by arguing that it injected irrelevant factors into the case. The petitioner argued that the list of potential aggravating factors was arbitrarily expanded, and the jury was permitted to consider irrelevant mitigating circumstances in aggravation. Id. The court held that the reading of the list of factors gave the jury more guidance, not

less. Id. The court noted that the jury instructions expressly indicated that the jury was to consider each factor only "if applicable." Id.

In the present case, the trial court gave the following instruction regarding aggravating and mitigating factors:

> If a factor is not to be, by you, a mitigating factor, that, in and of itself, does not make that factor an aggravating factor, unless the [p]rosecution proves to you that factor is an aggravating factor.

RT 2600:5-8. This instruction made clear that the jury could not find the simple lack of a mitigating factor to be aggravating. Given the breadth of discretion allowed a penalty phase jury under Tuilaepa, this court finds that the instructions given were not unconstitutionally vague.

S. Jury Instructions Re Petitioner's Character and Background - Claim No. 21

Petitioner claims that the trial court's instructions precluded the jury from giving independent mitigating weight to petitioner's character and background evidence. The trial court instructed the jury according to CALJIC 8.84.1, which lists the mitigating and aggravating factors, including factor (k). Factor (k) allows the jury to consider "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, including but not limited to the

defendant's character, background, history, mental condition and physical condition." RT 2594-95. Petitioner contends the jury may have disregarded evidence of petitioner's character and background because the evidence did not "extenuate the gravity of the crime." Therefore, petitioner argues he was denied his constitutional right to full consideration of the evidence presented.

The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by a criminal defendant in capital sentencing proceedings. Boyde v. California, 494 U.S. 370, 370-71, 377 (1990). In Boyde, the petitioner's mitigating evidence included his impoverished childhood, inadequacies as a school student, and strength of character in the face of obstacles. Id. at 370. The trial court instructed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime, even though it was not a legal excuse for the crime." Id. The Supreme Court found that there was no reasonable likelihood that the jurors interpreted the jury instruction to prevent consideration of the mitigating evidence. Id. at 371. The instruction did not improperly limit the jury's consideration to the circumstances of the crime. Id.

Petitioner argues that Boyde is distinguishable from the present case because Boyde involved background and character evidence that could be viewed as an excuse for the crime. In Boyde, the petitioner's impoverished childhood and inadequacies as a student could be considered to lessen the

gravity of the crime, although they would not constitute a legal excuse. However, petitioner argues that in the present case, mitigating evidence of petitioner's artistic ability does not relate to the circumstances of the crime. The evidence only shows that petitioner could function in and contribute to prison society.

In fact, in Boyde, the Supreme Court did address the issue of artistic ability as mitigating evidence. At oral argument, though not in his brief, counsel for the petitioner argued that the fact that Boyde won a prize for his dance choreography while in prison showed that he could lead a useful life in prison. Boyde, 494 U.S. at 382-83 n.5. The Court found that the jury had the opportunity to conclude that the petitioner's dancing ability extenuated the gravity of the crime. Id.

Furthermore, the jury instructions in the present case were more explanatory than the Boyde instructions. In the case at issue, the instructions included the phrase "including but not limited to the defendant's character, background, history, mental condition and physical condition." RT 2594-95. The Boyde instructions, which the Supreme Court found proper, did not include this additional phrase. In addition, the trial court in the present case expressly advised the jury that it was free to consider the sympathetic elements of defendant's background and sympathy for the defendant.[34/] Therefore, this court finds

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34. The trial court instructed:
In determining the question of penalty to be imposed upon the Defendant, you shall weigh

that the jury instructions given did not violate petitioner's constitutional rights by precluding the jury from giving independent mitigating weight to petitioner's character and background evidence.

T. Prior Criminal Acts as Multi-aggravating Factors - Claim No. 22

Petitioner claims that the trial court erred by not giving a limiting or modifying instruction to explain how factors (a), (b), and (c) relate to determine the aggravating circumstances. Those circumstances are:

> A, the circumstances of the crime of which the Defendant was convicted in the present proceeding, and the existence of any special circumstances found to be true; B, the presence or absence of criminal activity by the Defendant, which involved the use or attempted use of force or violence, or the express or implied threat to use force or violence; and C, the

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> the sympathetic element of Defendant's background against those that may offend the conscience. In so doing, the jury may consider pity, sympathy, and mercy; however. you may not be governed by conjecture, prejudice, or public opinion.

RT 2600:13-18.

presence or absence of any prior felony conviction.

RT 2594:16-23. Petitioner argues that the trial court should have instructed the jury that prior felony convictions, factor (c), and criminal activity involving force or violence, factor (b), referred to criminal acts other than the El Dorado County crimes. Also, the trial court should have given a limiting or modifying instruction to prevent the "double counting" of the 1971 and 1976 rape convictions under factors (b) and (c), and the 'triple counting" of the criminal activities under factors (a), (b), and (c). Furthermore, petitioner contends that the prosecution encouraged "double counting" as to the prior rape convictions under both factors (b) and (c). Therefore, petitioner concludes there was a reasonable likelihood that the jury improperly inflated the aggravating circumstances in violation of the fair and reliable capital sentencing requirement of the Eighth and Fourteenth Amendments.

With regard to what is essentially a vagueness challenge to factor (b), the Supreme Court held that factor (b) is not vague in Tuilaepa v. California, 512 U.S. 967 (1994). See Bonin v. Calderon, 59 F.3d 815,848 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996). Further, the court does not find factor (c) vague for failure to exclude the present conviction. Factor (c) refers to "prior" felony convictions. No reasonable penalty phase jury would interpret factor (c) to include petitioner's guilt phase conviction. Consequently, petitioner's allegations of double-counting as between factors (a) and (b) or factors (a) and (c) are incorrect.

With regard to the argument that the instructions permitted double counting of the prior rape convictions under factors (b) and (c), there is no reasonable possibility that "the jury performed a mechanical counting up of factors in aggravation and in mitigation and based its decision on which had registered more tallies." Odle v. Vasquez, 754 F. Supp. 749. 771 (N.D. Cal. 1990) (citing Harris v. Pulley, 692 F. 2d 1189, 1203 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 37 (1984)). There is no support for the assumption that the jury mechanically doubled the weight of each prior crime because it fit under more than one factor. See Bonin v. Vasquez, 807 F. Supp. 589, 620 (C.D. Cal. 1992), .aff'd, 59 F.3d 815 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996). On the other hand, there is support for the more reasonable assumption that the jury did more than simply count and weigh the factors. The trial court instructed the jury along these lines:

> In considering taking into account being guided by the aggravating and mitigating circumstances, you may not decide the affect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by their relative number, but rather by their relative convincing force on the ultimate question of punishment.

RT 2599-2600.

Given the trial court's admonishment not to mechanically weigh the factors, this court finds no constitutional error in the alleged overlap between factors (b) and (c). See Odle, 754 F. Supp. at 771.

U. Mandatory. Language of Penalty Phase Instructions - Claim No. 23

Petitioner claims that jury instructions, given at the conclusion of evidence in the penalty phase, unconstitutionally restricted the jury's sentencing discretion. Specifically, petitioner argues that it is reasonably likely that the mandatory language of CALJIC 8.84.2 misled the jury into believing that death was mandatory if the aggravating circumstances outweighed the mitigating circumstances. CALJIC 8.84.2 reads as follows:

> After having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the aggravating and mitigating circumstances upon which you have been instructed.
>
> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life

without the possibility of parole.

RT 2599; CT 834. Petitioner further contends that this presumption in favor of death is insupportable under California law, which charges the jury with determining that death is the appropriate punishment in light of all the evidence, even where there is no mitigation. See People v. Durlcan, 53 Cal. 3d 955,979 (1991), cert. denied, 503 U.S. 908 (1992). Therefore, petitioner argues that the instruction violated his due process rights by depriving him of a state-law procedural safeguard, i.e., the right not to be sentenced to death unless the jury understands its ultimate responsibility to determine the appropriate sentence.

1. Mandatory Language

The Supreme Court considered CALJIC 8.84.2 in Boyde v. California, 494 U.S. 370 (1990) and the mandatory language of penalty phase instructions more generally in Blystone v. Pennsylvania, 494 U.S. 299 (1990). In Boyde, the petitioner argued that CALJIC 8.84.2 did not adequately inform the jury as to its discretion in determining the sentence. 494 U.S. at 376. The Court held that the mandatory language of the instruction did not unconstitutionally restrict jury sentencing discretion. Id. at 377. The Court reasoned that there is no constitutional requirement of unfettered sentencing discretion which permits a jury to have the freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances outweigh the mitigating circumstances. Id.

Additionally, the Court quoted with approval the California Supreme Court's conclusion that the jury had been "adequately informed as to its discretion in determining whether death was the appropriate penalty." Id. at 376 (quoting Boyde v. California, 46 Cal. 3d 212, 253 (1988)).

In Boyde the Court relied heavily on its decision in Blystone. Blystone involved a Pennsylvania death penalty statute which, in part, mandated the death penalty if the jury unanimously found at least one aggravating circumstance and no mitigating circumstances. 494 U.S. at 301. The petitioner argued that the mandatory nature of the instruction unconstitutionally, restricted the discretion of the sentencing jury to weigh the aggravating and mitigating circumstances however it deemed appropriate. Id. at 302. In rejecting the petitioner's argument, the Supreme Court held that the requirement of individualized sentencing in capital cases is met by allowing the jury to consider all relevant mitigating factors. Id. at 307. This sufficiently satisfies the heightened standards of the Eighth Amendment. Id. at 308.

In the present case, the "shall" language of the instruction was clarified by the court, prosecutor, and defense counsel. The court further instructed the jury that:

> In considering taking into account being guided by the aggravating and mitigating circumstances, you may not decide the affect of such circumstances by the simple process of counting the number of

> circumstances on each side. The particular weight of such opposing circumstances is not determined by their relative number, but rather by their relative convincing force on the ultimate question of punishment.

RT 2599-2600. The prosecutor explained to the jury:

> [T]he things we are talking about are not really such that can be placed into an accounting. No one is asking you to count these eleven factors and the say that there are seven that weigh one way and four that weigh another. You are not to decide simply on numbers, but to weigh them in a moral sense that accords something far more difficult than simply balancing four against seven or five against six.

RT 2569. Defense counsel echoed the importance of the weighing process and the discretion of the jury. RT 2578. Considered together, the closing arguments and instructions from the court diminished possible confusion in the jury's discretion or sentencing role resulting from the "shall" language of CALJIC 8.84.2.

2. Liberty. Interest

Petitioner asserts that state-law procedural safeguards were not met and that these safeguards created a liberty interest protected by the Due Process Clause. Petitioner is correct in

noting that deprivation of a state-law procedural safeguard can be a violation of due process. See Hicks v. Oklahoma, 447 U.S. 343 (1980). In Hicks, the jury gave the petitioner a forty-year sentence, as mandated by a provision of the state habitual offender statute. Id. at 345. The appeals court later declared the provision unconstitutional, but affirmed the petitioner's sentence. Id. The Supreme Court reversed, holding that a defendant's interest in the exercise of the jury's discretion in imposing punishment is not merely a matter of state procedural law, but is a liberty interest that the Fourteenth Amendment preserves against arbitrary deprivation by the state. Id. at 346.

The problem with petitioner's argument is that California law had not created the supposed liberty interest at the time of the petitioner's trial (1981). Not until four years later did the California Supreme Court raise concerns over CALJIC 8.84.2 in People v. Brown, 40 Cal. 3d 512, 541 (1985). The petitioner in Brown asserted that the mandatory language of CALJIC 8.84.2 confined the jury's sentencing discretion to a mechanical counting of aggravating versus mitigating factors. 40 Cal. 3d at 538. At that time, the court commented that CALJIC 8.84.2 had the potential for confusion in the law "which calls for certain prophylactic instructions in future death penalty trials." Id. at 538 n. 9. However, the court ultimately ruled that the mandatory language of the instruction did not unconstitutionally restrict the discretion of the jury. Id. at 544.

Petitioner's claim that the mandatory language of the penalty phase instructions, CALJIC 8.84.2, unconstitutionally

restricted the jury's sentencing discretion has been addressed and answered by the Supreme Court in both Boyde and Blystone. Consequently, any concerns raised by the California Supreme Court in Brown are irrelevant in light of the later holding that the instructions were constitutionally valid. California procedural law, at the time of petitioner's sentencing, did not create any constitutionally protected interests. Therefore, this court finds that jury instructions CALJIC 8.84.2 did not unconstitutionally restrict the jury's discretion.

V. Nonstatutory. Aggravating Factors - Claim No. 24

Petitioner claims that both the trial court and the prosecutor presented the jury with nonstatutory aggravating factors. Petitioner contends that allowing the jury to consider nonstatutory aggravating factors deprived petitioner of a state-law procedural safeguard, i.e., the right to be sentenced to death solely on the basis of statutory aggravating factors, and therefore violated petitioner's due process rights. Additionally, petitioner claims that the prosecutor encouraged the jury to consider mitigating evidence in aggravation which created an arbitrary and irrational sentencing process in violation of the Eighth and Fourteenth Amendments.

1. Consideration of Nonstatutory Aggravating Factors

Under California law, the jury is given a set of eleven factors, listed in California Penal Code § 190.3, none of which are characterized as aggravating or mitigating. The California

Supreme Court held in People v. Boyd, 38 Cal. 3d 762 (1985), that evidence not relevant to a listed factor is inadmissible. However, a writ of habeas corpus is available under U.S.C. § 2254(a) only on the basis of some transgression of federal law binding on the state courts. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)), cert. denied, 478 U.S. 1021 (1986). It is unavailable for alleged error in the interpretation or application of state law. Estelle v. McGuire, 502 U.S. 62, 71-72 (1991); see also Middleton, 768 F.2d at 1085; Lincoln v. Sunn, 807 F.2d 805,814 (9th Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

The Ninth Circuit has specifically held that habeas corpus relief is unavailable for alleged errors in the interpretation or application of state sentencing laws. Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989). So long as a state sentence "is not based on any proscribed federal grounds such as being cruel and unusual, racially or ethnically motivated, or enhanced by indigency, the penalties for violation of state statutes are matters of state concern." Makal v. Arizona, 544 F.2d 1030, 1035 (9th Cir. 1976), cert. denied, 430 U.S. 936 (1977). In order for error in the state trial proceedings to reach the level of a due process violation, the error had to be one involving "fundamental fairness." Estelle, 502 U.S. at 73. The Supreme Court has defined the category of infractions that violate fundamental fairness very narrowly. Id.

Further, the Supreme Court has repeatedly held that

the consideration of an improper aggravating circumstance does not necessarily constitute a due process violation. See Wainwright v. Goode, 464 U.S. 78 (1983); Barclay v. Florida, 463 U.S. 939 (1983); Zant v. Stephens, 462 U.S. 862 (1983). In Wainwright, the trial court improperly considered the defendant's future dangerousness as an aggravating circumstance. The Court of Appeals remanded the case, stating that the judge erroneously relied on the invalid factor. The Supreme Court reversed, reasoning that there was "no basis for concluding that the procedures followed by the state produced an arbitrary or freakish sentence forbidden by the Eighth Amendment." Wainwright, 464 U.S. at 87. The Court went on to say that even if the judge did rely on the improper factor, the sentence would still be constitutional under Barclay.

In Barclay, the trial judge considered the defendant's criminal record as an aggravating factor; yet Florida law specified that a prior criminal record is not a proper aggravating circumstance. 463 U.S. at 944. The Supreme Court held that the death sentence was constitutionally valid. Id. at 947. The Court reasoned that "as long as the [sentencer's] discretion is guided in a constitutionally adequate way, and as long as the decision is not so wholly arbitrary as to offend the constitution, the Eighth Amendment cannot and should not demand more." Id. at 950. The issue is "whether the [sentencer's] consideration of the improper aggravating circumstance so infects the balancing process created by the [state] statute that it is constitutionally impermissible for the [state supreme court] to let it stand." Id. at 956.

The Court came to a similar conclusion in Zant. The jury sentenced the defendant to death after finding three statutory aggravating circumstances. Zant, 462 U.S. at 867. The Supreme Court of Georgia subsequently found one of the aggravating factors invalid. Id. at 867-68. After a grant of habeas relief by the court of appeals, the Supreme Court reversed. Id. at 868. The Court held that a death sentence supported by one valid aggravating factor need not be set aside because another aggravating circumstance is determined to be invalid or insufficient itself to support the death penalty. Id. at 885-886. However, this is true only when the invalidity did not involve any constitutionally protected behavior, the evidence was otherwise properly before the jury, and the evidence was not misleading or inaccurate. Id.

In this case, petitioner contends that on four occasions the jury was given nonstatutory aggravating circumstances to consider as aggravating factors. On the first occasion, the prosecutor addressed the jury regarding each one of the statutory factors to be considered. While discussing California Penal Code § 190.3(b)3[35], the prosecutor stated, "Mr. Karis cares nothing for authority. He cares nothing for parole." RT 2562 (emphasis added). Second, after presenting each of the eleven aggravating and mitigating factors to the jury, the

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35. "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

prosecutor responded to probable defense arguments. The prosecutor conceded that petitioner may have artistic talent, but argued that "despite all of his talents, he has turned to base and immoral purposes. He grows marjiuana for profit. He rapes for pleasure and kills to avoid apprehension." RT 2569 (emphasis added). Petitioner claims that these statements "urged" the jury to consider nonstatutory aggravating factors, petitioner's parole status and growing marijuana. in violation of state law, and that, therefore, these statements violated petitioner's due process rights.

To determine whether the transgressions of state law rose to the level of a constitutional violation, the statements of the prosecutor "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle, 502 U.S. at 72 (quoting Cupp v. Naughten, 414 U.S. 141,147 (1973)). In the context of the instructions as a whole, the statements of the prosecutor did not so infect the balancing process as to produce "arbitrary or freakish" results which would offend the constitution. See Wainwright, 464 U.S. 78; Barclay, 463 U.S. 939. Both statements referred to evidence which petitioner already presented to the jury during the penalty phase. Petitioner testified that he was illegally cultivating approximately one hundred marijuana plants "for the profit." RT 2031. He described for the jury how and where the marijuana was grown. RT 2032. Petitioner gave extensive testimony explaining that he had fled from the police in order to escape arrest for growing marijuana and violating his parole. RT 2040 - 2043; 2072 -

2074. Petitioner attributed his "paranoid" state of mind at the time of his flight to his involvement with growing marijuana. RT 2043. The record does not indicate that the prosecutor emphasized either the marijuana cultivation or the parole violation while discussing the aggravating factors of petitioner's crime. Viewed as part of the twenty-one pages of the prosecutor's closing argument, the two questioned statements did not misguide the jury so as to make the penalty phase fundamentally unfair.

The third statement petitioner complains of involves the jury instructions given by the court. The court stated, "you shall weigh the sympathetic elements of the defendant's background against those that offend the conscience." RT 2600 (emphasis added). Petitioner asserts that this instruction made it reasonably probable that the jury considered factors which "offend the conscience" even though such factors may not be relevant to any statutory circumstance.

This argument fails because counsel for petitioner specifically requested the instruction in lieu of the original instruction. RT 2547. Accordingly, any objection raised at this stage should be framed in terms of ineffective assistance of counsel. Petitioner has not made that claim. Even if he had, Petitioner could not show that the instruction prejudiced him under Strickland v. Washington, 466 U.S. 668, 691-94 (1984). Under Strickland, petitioner must show that counsel's conduct prejudiced him. 466 U.S. at 691-692. Prejudice is found where "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The statement at issue here was part of a larger set of jury instructions describing the aggravating and mitigating circumstances and how they are to be weighed. The court correctly instructed the jury to be guided by the eleven factors listed in California Penal Code § 190.3. RT 2599. The court explained that before an aggravating circumstances is considered, the jury must be satisfied of its existence beyond a reasonable doubt. RT 2599. The weighing process was described as not a process of simply counting factors, but as one of determining the relative weight to be given to each circumstance. RT 2599-2600. The allegedly erroneous instruction went on to say that "the jury may consider pity, sympathy, and mercy; however, you may not be governed by conjecture, prejudice, or public opinion." RT 2600. The court summarized the instructions by saying: "You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in light of all the others." RT 2600. In light of these correct instructions to the jury, there is no reasonable likelihood that the jury was misled by the allegedly improper statement.

Fourth, petitioner claims that the court itself considered a non-statutory aggravating factor when reviewing the jury's determination that the aggravating circumstances outweighed the mitigating circumstances. The court

independently examined each factor provided in § 190.3. When evaluating factor (k)[36], the court stated:

> [Mr. Karis'] performance and conduct in state prison would and could constitute a mitigating factor. However, since defendant was on parole at the time of the commission of the rape in Santa Clara county, and was on parole at the time of the offense, the court finds that the defendant's conduct outside the of the prison is an aggravating factor rather than a mitigating factor.

RT 2669. Petitioner argues that failure to perform on parole is not a proper aggravating factor and therefore the court erred in its evaluation.

Again, any erroneous application of state law by the trial judge must be examined in light of the entire findings of the court. Excluding factor (k), the court found the existence of four aggravating factors and no mitigating factors. These aggravating circumstances included the circumstances of the crime and the presence of special circumstances, the presence of criminal activity by the defendant which involved force or violence, petitioner's prior felony convictions, and petitioner's sole responsibility for his crime. RT 2661-69. Sufficient

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36. "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

aggravating circumstances existed, without factor (k), to support the court's ultimate conclusion that the aggravating circumstances outweighed the mitigating circumstances. Even if the court had substantially relied on factor (k), the decision would not necessarily be unconstitutional under Barclay and Zant. Therefore, the court's consideration of petitioner's violation of parole did not produce an arbitrary or freakish result or so infect the process as to violate the constitution.

2. Consideration of Mitigating Evidence in Aggravation

Petitioner further claims that the prosecutor encouraged the jury to consider mitigating evidence in aggravation against him. Petitioner argues that allowing the jury to consider mitigating evidence as evidence in aggravation created an arbitrary and irrational sentencing process which violated the Eighth and Fourteenth Amendments. Citing Zant v.Stephens, 462 U.S. 862, 885 (1983), petitioner asserts that an aggravating factor based on traits or conduct "that actually should militate in favor of a lesser penalty" violates due process.

A capital sentencer need not be instructed how to weigh any particular fact in the sentencing decision. See Tuilaepa v. California, 512 U.S. 967 (1994). In Tuilaepa, the jury sentenced the defendant to death, guided by the factors in California Penal Code § 190.3. Both the prosecution and the defense presented factor (i)[37] in support of their respective

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37. "The age of the defendant at the time of the crime."

positions. Id. The petitioner contended that the factor was therefore unconstitutionally vague. Id. The Supreme Court disagreed, holding the factor constitutionally valid. Id. The Court stated that both the prosecution and the defense may present valid arguments relating to the significance of a factor in a death penalty case. Id. "Competing arguments by adversary parties bring perspective to a problem, and thus serve to promote a more reasoned decision, providing guidance as to a factor jurors most likely would discuss in any event." Id.

In the present case, the prosecutor brought his perspective to the defense contention that petitioner had talent and deserved mercy. The prosecutor argued:

> [W]e see Mr. Karis, not as an impoverished individual, not somebody who was devoid of talents, who's devoid of intellectual capacity, not somebody who, by virtue of being so poor an individual, so lacking in ability was warped into being a killer. No, on the other hand, Mr. Karis has all of the ability, but he changed his life into that of visiting evil destruction and death on fellow human beings.

RT 2568. The prosecutor was summarizing his closing arguments and addressing the probable arguments of the defense. He did not attempt to present this as evidence in support of a specific factor. This statement constituted a valid argument relating to the significance of mitigating evidence already submitted to the jury.

Petitioner's reliance on Zant v. Stephens is misplaced. As discussed above, Zant applies to evidence that involves constitutionally protected behavior, evidence improperly before the jury, or evidence that misguides or is inaccurate. 462 U.S. at 885-886. In discussing evidence that "should militate in favor of a lesser penalty," the Court gave a defendant's mental illness as an example. Id. at 886. Although the talents or intelligence of a defendant often serve to mitigate, after Tuilaepa both sides may argue the significance of these factors. In sum, the prosecutor's statements did not violate petitioner's due process rights or create an arbitrary or irrational sentencing process.

W. Penalty Phase Instructions Re Burden of Proof Applicable to Weighing Aggravating and Mitigating Circumstances - Claim No. 25

Petitioner claims that the trial court erred because it gave no instructions regarding the burden of proof for determining that aggravating circumstances outweigh mitigating circumstances. Petitioner contends that the Due Process and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments require that the sentencer be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. Petitioner further claims that even if the beyond a reasonable doubt standard is not required, some

burden of persuasion is necessary to ensure evenhanded and consistent sentences.

This concern was raised and dismissed in Bonin v. Vasquez, 794 F. Supp. 957, 985 (C.D. Cal. 1992), aff'd, 59 F.3d 815 (9th Cir. 1994), cert. denied, 116 S. Ct. 718 (1996). In Bonin the petitioner made the same claim presented to this court. He argued that the jury must be convinced beyond a reasonable doubt that circumstances in aggravation outweigh those in mitigation. Bonin, 794 F. Supp. at 984. The court disagreed, stating that "constitutional concerns are met when each juror agrees that the aggravation, in toto, outweighs the mitigation in toto, or vice versa." Id. at 989. The court relied on the reasoning set forth in Harris v. Pulley, Zant v. Stephens, and Ford v. Strickland.

In Harris, the Ninth Circuit found no constitutional requirement that the appropriateness of the death penalty be established beyond a reasonable doubt. Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 37 (1984). The petitioner challenged the California death penalty statute claiming that the lack of a standard of proof in sentencing resulted in jury capriciousness. Id. at 1194. The court found this contention without merit.

> The United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed . . . . If the Supreme Court had intended for

> the burden in death penalty cases to vary from the standard burden in all other criminal sentencing, it would have said so in one of the many modern cases dealing with the death penalty.

Id. at 1195. The Ninth Circuit reasoned that other procedures mandated by the California statute guaranteed that the jury's discretion "will be guided and its consideration deliberate." Id. On appeal, the Supreme Court noted, without disapproval, that the Ninth Circuit had not found a constitutionally required standard of proof for death penalty sentencing. Pulley v. Harris, 465 U.S. 37, 41 n.4 (1984). A year earlier, the Court had concluded that "the constitution does not require a state to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Zant v. Stephens, 462 U.S. 862, 890 (1983).

More recently, the Supreme Court found no constitutional violation in a sentencing scheme which places the burden on the accused to prove by a preponderance of the evidence the existence of mitigating circumstances. Walton v. Arizona, 497 U.S. 639 (1990). The court supported the basic principle that "so long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or . . . to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated . . . ." Id. at 650.

Similarly, the Eleventh Circuit held that due process

does not require that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. Ford v. Strickland, 696 F.2d 804, 818 (11th Cir.) (en banc), cert. denied, 464 U.S. 865 (1983). Due process protects a defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. (quoting In re Winship, 397 U.S. 358 (1970)). Aggravating and mitigating circumstances come into play after conviction as part of the weighing process and are not subject to the same requirements of due process as are the elements of a crime. Id. The weighing of factors, unlike the finding of facts, "is not susceptible to proof by either party." Id. Constitutional concerns are satisfied when "the sentencing authority's discretion is guided and channeled by required examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Id. (quoting Proffitt v. Florida, 428 U.S. 242, 258 (1976)).

This court finds the reasoning set forth in these cases persuasive. The weighing of aggravating and mitigating circumstances is sufficiently guided by procedural safeguards guaranteed by the California statute. The truth of any special circumstance must be found beyond a reasonable doubt. The jury is instructed that each aggravating factor must be found beyond a reasonable doubt. The jury must be unanimous in finding that circumstances in aggravation outweigh those in mitigation. These procedures guide the jury's discretion during the weighing process, eliminating capricious or arbitrary

sentences.

X. Trial Court's Denial of Application for Modification of the Penalty - Claim No. 26

California Penal Code § 190.4(e)[38/] mandates that a defendant who has been sentenced to death is automatically deemed to have made an application for modification of the verdict. Petitioner's claim no. 26 is that the trial court committed several errors in its review of the evidence in support of the verdict. Petitioner contends that during the modification

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38. Penal Code § 190.4(e):

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or evidence presented. The judge shall state on the record the reasons for his findings.

review the trial court erroneously considered the Report and Recommendation of the Sacramento County Probation Office. Petitioner further contends that the trial court erred by relying on improper aggravating circumstances, again allegedly in violation of state procedure. Petitioner claims that although these errors are violations of state law, they deprived petitioner of a procedural safeguard established by the California Penal Code and thereby violated petitioner's due process fights.

1. Legal Standards

As discussed above, a writ of habeas corpus is generally available under U.S.C. § 2254(a) only on the basis of some transgression of federal law binding on the state courts. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)), cert. denied, 478 U.S. 1021 (1986). Federal courts may not grant habeas relief where the sole ground presented involves a perceived error of state law, unless said error is so egregious as to amount to a violation of the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Pulley v. Harris, 465 U.S. 37, 41 (1984). Error in the state trial proceedings only reaches the level of a due process violation if it involves "fundamental fairness." Estelle v. McGuire, 502 U.S. 62, 73 (1991).

However, state law may give rise to a constitutionally protected liberty interest. See Hicks v. Oklahoma, 447 U.S. 343 (1980); Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993), cert. denied, 513 U.S. 914 (1994); Campbell v. Blodgett, 997 F.2d

512 (9th Cir. 1993), cert. denied, 510 U.S. 1215 (1994). In Hicks, the jury gave the petitioner a forty-year sentence as mandated by a provision of the state habitual offender statute. 447 U.S. at 345. The appeals court subsequently declared the provision unconstitutional, but affirmed the petitioner's sentence. Id. The Supreme Court reversed, holding that a defendant's interest in the exercise of the jury's discretion in imposing punishment is not merely a matter of state procedural law, but is a liberty interest preserved by the Fourteenth Amendment. Id. at 346. The court reasoned that a "defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." Id.

Similarly, the Ninth Circuit held in Fetterly that "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment." 997 F.2d at 1299. In Fetterly, the trial court, sitting without a jury, sentenced the defendant to death after finding that the total weight of mitigating circumstances did not outweigh the total weight of aggravating circumstances. Id. at 1297. The Supreme Court of Idaho later explicitly disapproved of such a weighing approach, saying that the Idaho statute required each aggravating factor to be weighed separately against the total mitigating factors. Id. The Ninth Circuit found that the state statutory procedure for the weighing of aggravating and mitigating circumstances had created a liberty interest protected under the Due Process Clause. Id. at 1301. Applying a harmless error analysis, the court reasoned that

"others similarly sentenced in Idaho have been and will necessarily be treated differently if mitigating circumstances in their respective cases are grouped against each aggravating circumstance, rather than against the aggravating circumstances as a whole." Id. at 1299-1300.

Additionally, the Ninth Circuit determined that a state procedural law had created a protected liberty interest in Campbell. The petitioner claimed that a statutorily required review of the record for evidence of passion or prejudice had not been sufficient, that state law created a liberty interest in this review, and therefore petitioner had been denied his due process rights. Campbell, 997 F.2d at 521. The court agreed that the statute created a liberty interest for in having the state supreme court make such a review. Id. at 522. However, the Washington Supreme Court had conducted the mandated review and made the requisite findings. Id. Therefore,

> [Petitioner's] argument thus devolves into a complaint regarding the manner in which state law was applied: a claim that the court's review was inadequately conducted. To the extent [petitioner's] claim asserts that the review was so deficient he was effectively deprived of his right, we reject his claim for reasons below. To the extent any error alleged is less egregious, we return to our initial proposition: it is not cognizable in federal habeas corpus.

Id.

2. Analysis

In the instant case, petitioner alleges four violations of state procedure occurred during the court's § 190.4(e) review. First, petitioner refers to the court's consideration of a probation report which had not been presented to the jury as evidence. Petitioner argues that statements in the report by the victim and information on petitioner's parole record were likely to influence the court. Second, petitioner contends that the court improperly considered the lack of mitigating evidence relevant to factor (j)[39] as an aggravating circumstance. RT 2668-2669. Third, petitioner argues that the court referred to the fact that petitioner was on parole at the time of the 1976 Santa Clara County rape and erroneously stated that "the court finds that the defendant's conduct outside of state prison is an aggravating factor rather than a mitigating factor." RT 2669. Fourth, petitioner alleges that the trial court "double counted" the crimes against the victims under factors (a)[40] and (b)[41], although these

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39. "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."

40. "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1."

41. "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or

crimes were relevant only to factor (a). RT 2661-2664.

This court finds that petitioner has a liberty interest, created by the state procedure set forth in California Penal Code § 190.4(e), in having an automatic application for modification and review of the evidence. But this interest is limited to a determination by the judge as to whether the jury's findings and verdicts are contrary to the law or evidence presented. Assuming, *arguendo*, that these instances did amount to violations of state law, they must be examined together as part of the entire § 190.4(e) proceeding. In that light, this court finds that the trial court performed a constitutionally satisfactory review. Guided by each of the factors set forth in § 190.3, the trial court found a total of five aggravating circumstances (factors (a), (b), (c), (j), and (k)) and no mitigating circumstances. RT 2661-2670. Petitioner alleges that the findings relevant to (b)[42], (j), and (k) result from misapplication of state law. However, setting such evidence aside, factors (a) and (c) provided sufficient aggravating evidence to support the court's conclusion that the verdict and findings of the jury were not contrary to the law or evidence presented. Under factor (a), the court found that evidence relating to the circumstances of

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violence or the express or implied threat to use force or violence."

42. Petitioner only objects to the findings under factor (b) which are a repetition of the findings under factor (a). The court's other findings under factor (b) are not challenged here.

the crime, set out in several detailed pages, constituted evidence in aggravation, as did the existence of two special circumstances. RT 2661-2664. In relation to factor (c), the court weighed petitioner's two prior felonies for rape as additional aggravating circumstances. RT 2665-2666. Therefore, the court's allegedly mistaken application of state law did not jeopardize the "fundamental fairness" of the § 190.4(e) review or create violations of state law which were "so egregious" as to violate the constitution. See Estelle, 502 U.S. at 73; Pulley, 465 U.S. at 41. Any further contention by petitioner that these instances violated state procedure is a matter of state law and is not before this court. See Middleton, 768 F.2d at 1085.

Y. Erroneous Information Re Enhancements - Claim No. 27

The trial court erred when it advised petitioner of the enhancements he would suffer if he admitted his prior convictions. The court told petitioner his sentence would be enhanced by three or five years for each of the prior convictions. Petitioner then admitted his 1976 conviction and agreed to waive his right to a jury trial as to the validity of his 1971 conviction. RT 1444, 2325-32, 2337. The trial court later found petitioner had admitted both prior convictions and imposed consecutive ten-year enhancements for each prior conviction. RT 2656-57.

It is not clear that petitioner had a constitutional right to be advised of the amount of time admission of his prior convictions would add to his sentence. See Lowell v. Prunty, 91 F.3d 1358, 1359 (9th Cir. 1996), cert. denied, 117 S. Ct. 1340 (1997). Holding that it need not decide this issue, the court of appeals in Lowell applied harmless error analysis to a contention similar to petitioner's. Id. Any error here was harmless, as well. Petitioner does not allege that his 1971 conviction was invalid. As described below with respect to claim no. 28, petitioner's challenge to his 1976 conviction should not succeed. The court finds beyond a reasonable doubt that, even if petitioner had been correctly advised as to the sentence enhancements, the result would not have been different. Accordingly, claim no. 27 should be denied.

Z. Ineffective Assistance of Counsel for Failure to Object to Admission of 1976 Conviction - Claim No. 28

During the penalty phase, the prosecution presented petitioner's 1976 rape conviction. The victim testified. Petitioner claims that the 1976 conviction resulted from ineffective assistance of counsel. Specifically, petitioner claims:

1. Counsel failed to issue a new subpoena to John Brickell after the trial was continued. Brickell would have impeached the victim's testimony that she did not have prior knowledge of petitioner.

2. Counsel incorrectly advised petitioner that if he testified his 1971 rape conviction would inevitably come in, so petitioner chose not to testify.

3. Counsel failed to show inconsistencies in the victim's statements regarding the time petitioner picked her up and failed to present witnesses who would have testified as to petitioner's whereabouts.

4. Counsel failed to present evidence that forensic testing showed no link to petitioner.[43/]

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43. Petitioner admits that this claim was originally that counsel presented no evidence about: (1) petitioner's willingness to have further testing of the semen found in the victim and, (2) no evidence about the fact the government had improperly stored and thus destroyed the semen sample taken from the victim. However, no evidence has been presented about improper storage of the semen sample. Respondents argue here, and with respect to other points raised by petitioner, that petitioner failed to raise the points in the petition and/or exhaust them. Respondents' argument ignores the purpose of an evidentiary hearing: to bring out new facts. Petitioner's basic claims are the same as those raised in the petition and those exhausted in state court. Nothing petitioner argues now fundamentally changes the state court claims of ineffective assistance of counsel for failure to challenge the 1976 conviction. See Vasquez v. Hillery, 474 U.S. 254, 257-58 (1986).

1. Factual Background of 1976 Case[44/]

The victim testified that she and her sister left home on November 11, 1975 at about 5:00 p.m. to walk to the high school. On their way, their parents stopped and picked up the victim's sister. The victim continued walking and then hitchhiking to her boyfriend's house. At about 5:30 p.m., a truck stopped to pick her up. Shortly after she got into the truck, the driver forced her head down to the seat, placed something that felt serrated on her neck, and told her that if she cooperated she would not be hurt. The driver then handcuffed her hands behind her back. He drove to a remote area outside San Jose, removed the handcuffs, told her to remove her clothes, and raped her. The driver had removed a large roll of tape from his car but did not use it. He then helped her look for a roach clip that had fallen out of her pocket. He used a zippo cigarette lighter to search for the clip in the dark. He offered to drive her back to town and she refused. As he drove away she saw the truck's license number. She walked for about half an hour and called her boyfriend from a pay telephone. Her boyfriend contacted the police.

A police officer testified that the victim had marks on her wrists that looked like she had been handcuffed. Another

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44. This factual overview is the result of the court's review of the transcript of petitioner's 1976 trial. The "RT" references in this discussion are to the transcript of the 1976 trial.

officer testified that the license plate for the truck revealed that it belonged to petitioner's mother, Eva Jones. That officer went to Ms. Jones' home and asked her about the location of the truck. She told him petitioner had it. When he returned home, petitioner telephoned the officer to discuss the investigation.

Petitioner was identified by a zippo lighter in his pocket, RT 168-69, a set of handcuffs that had been removed from the truck and hidden in his cousin's garage, RT 167, and a roll of tape in the truck, RT 165. On the day of the rape, the victim could not identify petitioner from an old picture but two days later identified a current picture of him. RT 179-80.

Petitioner did not testify. The defense case consisted solely of an attempt to show that the victim had a reputation for dishonesty and that she knew petitioner's brother and had seen petitioner's picture when, a couple of years before, she had visited the house. To get a continuance, trial counsel made an offer of proof that a person named Brickell would have testified that in early fall 1975 he hit petitioner's brother on the head with a baseball bat and petitioner then threatened Brickell. Thereafter, Brickell, the victim, and others had conversations where petitioner's name was mentioned. RT 267-68. However, due perhaps to petitioner's counsel's failure to secure a subpoena, Brickell did not testify.

2. Analysis

On an ineffective assistance of counsel claim, the

court must first determine whether or not counsel's conduct met an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must then show counsel's conduct prejudiced him. Id. at 691-92. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also United States v. Murray, 751 F.2d 1528, 1535 (9th Cir.), cert. denied, 474 U.S. 979 (1985); United States v. Schaflander, 743 F.2d 714, 717-18 (9th Cir. 1984) (per curiam), cert. denied, 470 U.S. 1058 (1985).

Whether or not counsel acted unreasonably in the 1982 trial by failing to object to the admission of the 1976 conviction and in the 1976 trial by the numerous errors alleged, petitioner has failed to show prejudice. There was no prejudice in the failure of penalty phase counsel to object to the conviction because such an objection, even if supported by all the evidence presented here, would not have been successful. Petitioner has not shown a reasonable probability that but for counsel's supposed errors in 1976, the result of his trial would have been different.

Petitioner first alleges that counsel at his 1976 trial failed to pursue an alibi defense by showing discrepancies in the victim's statements about the time petitioner picked her up and by putting on the testimony of Billy Gilpatrick and Ray Lamunyon. Petitioner claims that the victim told police she was

picked up at 5:25 p.m., testified at the preliminary hearing that the time was between 5:15 and 5:20 p.m., and testified at trial that the time was "[a]pproximately five-thirty." 1976 RT 85:28 - 86:4. Gilpatrick and Lamunyon both told the police that petitioner has been roofing Gilpatrick's house that day and had left at 5:30. Police report, ex. 410.

Petitioner dismisses or ignores several important items of testimony. First, the victim testified that she was not wearing a watch. 1976 RT 84:8-9. Second, and most importantly, the victim's mother testified that she left work that day at 5:19 p.m. 1976 RT 144:1-4. Her time card confirming that time was introduced into evidence. Her husband picked her up. On the way home, they saw their daughters walking toward the high school. 1976 RT 144:8-17. They stopped and picked up the victim's sister. 1976 RT 144:20-21. The victim's mother approximated that it was "around 5:29" when they stopped. 1976 RT 145:1-6. Therefore, the testimony supported the victim's testimony that she was picked up around 5:30 p.m. Gilpatrick and Lamunyon's testimony would not have supplied petitioner with an alibi.

Petitioner's argument that counsel's bad legal advice prevented him from testifying is also without support. Petitioner has not demonstrated what his testimony would have been absent the bad advice. Consequently, the court has no way to measure the prejudicial impact of counsel's alleged error.[45/]

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45. Petitioner's summary of the prejudicial effect of

Similarly petitioner has not presented reliable evidence of John Brickell's testimony had he been properly subpoenaed. At trial, King made an offer of proof that Brickell would testify that: (1) he was a good friend of the victim, (2) in late summer of 1975 he and the victim had several conversations where petitioner's name was mentioned, (3) sometime prior to those conversations he had hit petitioner's brother over the head with a baseball bat, and (4) in late September 1975 petitioner had threatened Brickell. RT 267:6-24. Even considering counsel's offer of proof at trial, it does not establish prejudice. The jury had already heard from petitioner's brother that, contrary to her testimony, the victim knew who petitioner was. RT 217:20 - 218:4. Further, there was substantial evidence of petitioner's guilt, including the victim's identification of the truck, lighter, and roll of tape, and the recovery of the hidden handcuffs.

Counsel's failure to show that there was no forensic evidence linking petitioner to the crime must also fail in light of the substantial evidence of guilt. Since petitioner has not shown prejudice as a result of trial counsel's conduct, he has not shown

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counsel's conduct skips right over this failure of proof: "It can be said with confidence that it is reasonably probable that a different outcome would have occurred if a Beagle motion had been brought and if the jury had been allowed to hear evidence from the independent alibi witnesses, from John Brickell, Jr., from the forensic reports and from Petitioner himself." Dec. 13, 1995 Reply Memo. at 77-78.

prejudice as a result of penalty phase counsel's. Claim 28 should therefore fail.

AA. Proportionality Review - Claim No. 29

Petitioner argues that the state's lack of intercase proportionality review violated his due process and equal protection rights. The Supreme Court has held that due process does not require comparative proportionality review. Pulley v. Harris, 465 U.S. 37 (1984). Petitioner's primary argument is that capital defendants are denied equal protection unless they receive the benefits of the "disparate sentence" statute, Cal. Penal Code § 1170. Section 1170(f)(1) requires the Board of Prison Terms to review every sentence imposed under the Determinate Sentencing Law ("DSL") to ascertain whether it is "disparate in comparison with the sentences imposed in similar cases." The capital sentencing scheme has no comparable requirement.

The California Supreme Court has found that the different treatment of capital defendants and defendants with determinate sentences does not violate the Equal Protection Clause. People v. Allen, 42 Cal. 3d 1222, 1286-88 (1986), cert. denied, 484 U.S. 872 (1987). That court's reasoning is persuasive. Equal protection concerns are not implicated because capital defendants and defendants with determinate sentences are not treated similarly. The disparate sentence law "is designed to isolate sentences that are beyond the 'normal range' for similar offenses." Id. at 1287. Under the DSL, "that

range may be broad, because it can be affected by consecutive sentencing and by various statutory enhancements, employed in different ways by different judges." Id. Under capital sentencing procedures, once a jury has found a defendant guilty of first degree murder and at least one special circumstance, there are only two possible penalties: death or life without parole. Either is within the "normal range" of sentences expected by a death-eligible defendant. Id.

Another key difference between the DSL and capital sentencing systems is that the capital system looks to "nonquantifiable" factors to determine the appropriate sentence. At the penalty phase, the jury is instructed to consider a list of factors as aggravating or mitigating in arriving at a sentence. Cal. Penal Code § 190.2. In considering those factors the jury has "unbridled discretion in determining whether the death penalty should be imposed." Tuilaepa v. California, 512 U.S. 967 (1994). Thus, the sentencing determination is more than a mechanical weighing of aggravating and mitigating factors:

> The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited

place.

Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996). Consequently, intercase proportionality review would be difficult, if not impossible. "[E]vidence or observations that persuaded juries in apparently 'comparable' cases not to asses the death penalty may not be immediately apparent from the cold record." Allen, 42 Cal. 3d at 1287. Accordingly, there are legitimate and rational reasons for the distinction between sentencing under the DSL and sentencing under the California capital scheme. Petitioner's equal protection challenge should fail.

BB. Unconstitutional Statutory Scheme - Claim No. 30

The California death penalty statute in effect at the time of petitioner's trial listed twenty-seven special circumstances. Petitioner claims that these special circumstances were so broad that they could be found in almost all first degree murder cases, or potential first degree murder cases. Therefore, petitioner argues, the California death penalty scheme does not adequately narrow the class of persons eligible for the death penalty as required by Zant v. Stephens, 462 U.S. 862, 876-78 (1983).

A capital sentencing scheme must conform to two requirements. First, at the eligibility or definitional stage, the statute must "carefully delimit . . . the classes of crimes for which the death penalty is a permissible punishment."

McKenzie v. Risley, 842 F.2d 1525, 1538 (9th Cir.), cert. denied, 488 U.S. 901 (1988). At the eligibility stage, the jury must find an aggravating circumstance, called a special circumstance in California, along with finding murder. Tuilaepa v. California, 512 U.S. 967, 972 (1994). The aggravating circumstance "must only apply to a subclass of defendants convicted of murder" and "may not be unconstitutionally vague." Id.

The second stage is the selection stage. There are separate requirements for the selection decision. It must be made by an "'individualized determination on the basis of the character of the individual and the circumstances of the crime.'" Tuilaepa, 512 U.S. at 972 (quoting Zant, 462 U.S. at 879). In Tuilaepa, the Court held that the factors to guide selection may be quite broad and open-ended. In California they are just that. For example, factor (a) requires the jury to consider as aggravating (or mitigating) the "circumstances of the crime. . . and the existence of any special circumstances." Thus, the narrowing required by the constitution need only take place at the eligibility stage and not at the selection stage. "[T]he sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" Id. at 979-80 (quoting Zant, 462 U.S. at 875).

To support his argument, petitioner relies solely upon the declaration of Steven F. Shatz. Prior to 1972 Shatz was a criminal practitioner. Since 1972 he has been a law professor

at the University of San Francisco School of Law. Professor Shatz opines that the special circumstances in effect in 1982 are so broad that they could be found in almost all first degree murder cases and potential first degree murder cases.

Though provocative, the Shatz declaration does not prove petitioner's claim. Shatz does not have the demonstrated expertise in statistics or empirical research necessary to qualify him to draw the scientific conclusions he claims. His conclusions are based on a subset of cases without any demonstration that it is either an adequate sample or randomly selected.

Shatz also appears to broadly or narrowly define categories to suit his conclusion. For example, Shatz asserts, without much analysis, that the "lying in wait" special circumstance could be found in most cases of premeditated murder. He also disregards cases where insufficient facts were provided and makes no attempt to show that this exclusion of cases does not invalidate the sample. The disregarded cases could prove important because they are numerous. Of the published cases considered, over 13% were disregarded for insufficient facts. See Shatz Decl. at 10.

Finally, the court should not simply accept one practitioner's opinion of the presence or absence of special circumstances in the cases reviewed. The question of whether reasonable jurors would find, beyond a reasonable doubt, special circumstances in the cases studied requires a more

complex analysis than that presented.

Petitioner has the burden of showing that the California statute does not satisfy Zant's narrowing requirement. The Shatz declaration is not sufficiently reliable to support petitioner's arguments. Accordingly, claim no. 30 should be denied.

CC. Unconstitutional Method of Execution - Claim No. 31

Petitioner challenges the lethal gas method of execution. At the time he filed his petition, lethal gas was the only method of execution in California. Cal. Penal Code § 3604. In 1992, in response to a pending challenge to the constitutionality of the lethal gas method, the California legislature amended § 3604 to include lethal injection as an alternative method of execution, if selected by the inmate. In 1994 a federal district court declared § 3604 unconstitutional to the extent it permitted the imposition of death by lethal gas. Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994).[46/] The court of appeals affirmed. 77 F.3d 301 (9th Cir. 1996). Thereafter, the legislature again amended § 3604 to permit an inmate to choose between lethal gas and lethal injection. If the inmate does not choose, lethal injection is now the default method of execution. The Supreme Court vacated the court of appeals opinion and remanded for reconsideration in light of

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46. Fierro is a class action under 42 U.S.C. § 1983. Petitioner is a member of the plaintiff class.

amended § 3604. __ U.S. __, 117 S. Ct. 285, 136 L. Ed. 2d 204 (1996).

Petitioner does not seek to litigate this claim at this time. He "submits that further proceedings n Claim No. 31 should be stayed pending the resolution of the appeals of the judgment in Fierro." Jan. 9, 1995 Memo. of Points and Auth. at 125. Since consideration of this issue is currently before the court of appeals, this court agrees that further consideration of claim no. 31 is unnecessary at this time.

DD. Claims Properly Before the Court - Claim No. 32

Petitioner contends that the court should find ineffective assistance of trial or appellate counsel if any claims are deemed by the court to be procedurally defaulted. Since the district court has held earlier that no claims herein are subject to procedural default, it need not examine claim no. 32.

EE. Cumulative Effect of Errors - Claim No. 33

The court finds the cumulative effect of all guilt phase errors found above, or assumed for the sake of argument to be true, did not have an unconstitutionally prejudicial effect on petitioner's trial. Similarly, while the court finds prejudicial the penalty phase ineffective assistance of counsel described above, the remaining penalty phase errors, considered cumulatively, did not have an unconstitutional prejudicial effect on the death verdict.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's petition for a writ of habeas corpus be granted as to the penalty phase of the trial on the basis of claim 17 and denied in all other respects.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 29, 1997.

John F. Moulds
UNITED STATES MAGISTRATE JUDGE

JFM:vw:cw
karis.fr

APPENDIX D

FILED
May - 2 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LESLIE KARIS, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	No. 98-99025 D.C. NO. CV-89-00527-JFM ORDER
JAMES LESLIE KARIS, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	No. 98-99026 D.C. NO. CV-89-00527-JFM

Before: BROWNING, HUG, and KLEINFELD, Circuit Judges.

The panel has voted to deny petitioner-appellee Karis's petition for rehearing. Judges Browning and Hug recommended denial of the suggestion for rehearing en banc. Judge Kleinfeld has voted to deny the request for rehearing en banc.

The full court has been advised of the request for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 33.

The petition for rehearing and request for rehearing en banc are DENIED.

APPENDIX E

FILED
May - 2 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LESLIE KARIS, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	No. 98-99025 D.C. NO. CV-89-00527-JFM ORDER
JAMES LESLIE KARIS, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	No. 98-99026 D.C. NO. CV-89-00527-JFM

Before: BROWNING, HUG, and KLEINFELD, Circuit Judges.

Judges Browning and Hug have voted to deny respondent-appellant Calderon's petition for rehearing and recommend denial of the suggestion for rehearing en banc. Judge Kleinfeld has voted to grant the petition for rehearing and the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing with suggestion for rehearing en banc is DENIED.

APPENDIX F

United States Constitution
Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

ORIGINAL

ORIGINAL

No. 02-434

NOV 18 2002

CLERK

In the Supreme Court of the United States

JEANNE WOODFORD, WARDEN OF THE CALIFORNIA STATE PRISON, SAN QUENTIN, PETITIONER,

v.

JAMES LESLIE KARIS, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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34 pp

No. 02-434

In the Supreme Court of the United States

JEANNE WOODFORD, WARDEN OF THE CALIFORNIA STATE PRISON, SAN QUENTIN, PETITIONER,

v.

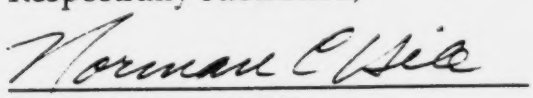
JAMES LESLIE KARIS, RESPONDENT.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent, JAMES LESLIE KARIS ("Respondent"), requests leave to file the attached Brief of Respondent In Opposition To Petition For Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Respondent's counsel is aware that Respondent was previously granted leave to proceed *in forma pauperis* in the Supreme Court of the United States and the United States District Court of the Eastern District of California, but has no information regarding previous leaves which may have been granted prior to his retention as counsel.

No affidavit is required, inasmuch as the U.S. District Court for the Eastern District of California appointed counsel for Petitioner under the Criminal Justice Act of 1864, 18 U.S.C. § 3006A.

Respectfully submitted,



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ORIGINAL

ORIGINAL

No. 02-434

Supreme Court
FILED
NOV 18 2002
CLERK

In the Supreme Court of the United States

JEANNE WOODFORD, WARDEN OF THE CALIFORNIA STATE PRISON, SAN QUENTIN, PETITIONER,

v.

JAMES LESLIE KARIS, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Does the Ninth Circuit's ruling that trial counsel's failure to investigate and present substantial evidence of Respondent's childhood physical, sexual, and emotional abuse constituted ineffective assistance of counsel, where trial counsel could proffer "no rational justification" for his inaction, conflict with the Court's decision in *Burger v. Kemp*, 483 U.S. 776 (1987)?

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RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTION

After a jury convicted James L. Karis of first degree murder in 1982, it had to decide whether he would live or die.

With a modicum of investigation, Karis' trial counsel could have presented to the jury "substantial and wrenching evidence" of how Karis was the victim of a violent and abusive childhood, including evidence that Karis' father beat and molested him, that his father and stepfather repeatedly beat his mother in his presence, and that his stepfather subjected him to "brutal abuse." Pet. App. A at 38, 41. But trial counsel did not do so. Instead, Karis' trial counsel presented a "mitigation" case that lasted only *forty-eight minutes*. That presentation attempted to mitigate the crimes by focusing only or Karis' artistic and academic talent and the fact that he had saved his brother from drowning when he was a child. *Id.* at 40-41. The jury sentenced Karis to death. *Id.* at 14.

In his federal habeas corpus petition, Karis maintained, among other infirmities, that he received constitutionally deficient representation during the penalty phase of his capital trial. *Id.* at 7. After an evidentiary hearing presenting three weeks worth of mitigation evidence that the jury never heard because trial counsel had failed to investigate and present it, the magistrate judge made findings granting penalty phase

relief. *See* Pet. App. C. The district court judge and Ninth Circuit majority emphatically agreed. As former Chief Judge Hug wrote for the Ninth Circuit,

> It is difficult to imagine what kind of standard the State conceives would allow trial counsel to rely almost solely on testimony that Karis was artistic and had academic potential to present a mitigating case, while failing to present any evidence of such substantial abuse to the jury for consideration in making a life or death determination for Karis.

Pet. App. A at 49.

In its Petition for Certiorari, the State urges that the Ninth Circuit erred because trial counsel's failure to investigate and proffer "substantial and wrenching evidence" of Karis' nightmarish childhood was an "express strategy." Pet. at 5. But the facts show just the opposite. "Until a week prior to the penalty hearing[,] Karis' trial counsel apparently intended to give the jury information on [Karis' childhood] abuse through the testimony and report of Dr. Albert Globus." Pet. App. A at 41. But then, because there was some damaging evidence in Dr. Globus' report, trial counsel changed his mind. At that point, however, trial counsel's "lack of thorough investigation left [him] unprepared to present what he had intended to be his major mitigating evidence." *Id.* at 52. Trial counsel did not make an "articulated tactical" decision; he simply abandoned "Plan A" when there was no time to develop "Plan B." *See id.*

In urging this Court to grant certiorari, the State ignores a fundamental fact. "There was no strategic reason offered" for trial counsel's failure to present Karis' wrenching family history, even though doing so entailed "no risk." *Id.* at 51. Karis' trial counsel "provided no rational justification for his failure to pursue an investigation

into petitioner's history of family abuse." *Id.* For this reason, this case is entirely unlike *Burger v. Kemp*, 483 U.S. 776 (1987), upon which the State heavily relies. The Ninth Circuit did not fail to accord *Strickland*[1] deference to trial counsel's strategic choice; in this instance, there was simply no "strategic reason" or "rational justification" to which it could plausibly defer. *Id.* at 51.

The Court should deny the State's petition for certiorari because neither *Strickland* nor *Burger* permit, much less compel, the Ninth Circuit to turn a blind eye when a man is sentenced to death after his trial counsel fails to present "substantial and wrenching evidence" of his abusive childhood when his life is in jeopardy, and the only other mitigating evidence presented concerns his "'artistic ability, intelligence, and . . . his youth.'" *Id.* at 52 (quoting the district court). The Ninth Circuit's decision comports with Supreme Court precedent.

II.

STATEMENT OF THE CASE

Respondent James L. Karis, was convicted of first degree murder in 1982. Pet. App. A at 14. After Karis' trial counsel presented only forty-eight minutes of mitigation evidence, the jury sentenced Karis to death.[2] *Id.* at 40. In that forty-eight minutes, even though he was fully aware of it, trial counsel failed to present any evidence of the

---

1 *Strickland v. Washington*, 466 U.S. 668 (1984).

2 This abbreviated presentation is explained, at least in part, by the fact that penalty phase counsel spent only sixty-six hours on Karis' case total, and much of that time was in fact dedicated to assisting with the guilt phase. *See* Karis' Supplemental Appendix of Record at 5407-5420 (submitted to the Ninth Circuit with Karis' "Opposition Brief and Opening Brief on Cross-Appeal.").

"substantial and wrenching evidence of Karis' violent and abusive childhood." *Id.* at 38. Trial counsel omitted evidence that both Karis' father and stepfather beat Karis and that Karis' father sexually molested him and his half-sister. Pet. App. C at 75, 89. Instead, trial counsel relied almost entirely on "testimony that Karis was artistic and had academic potential." Pet. App. A at 49.

Karis' trial counsel acknowledged that evidence of a family history of violence and abuse was relevant to Karis' penalty phase hearing. *Id.* at 41. Indeed, trial counsel learned about such violence and abuse through a medical expert, Dr. Albert Globus, who interviewed Karis' mother, Mrs. Marie Jones. *Id.* During this interview, Dr. Globus discovered that Karis' childhood was "characterized by violence directed at his mother and himself." *Id.* at 41. Within this environment, "Karis was subjected to seeing his mother mistreated and being aware of some sexual abuse as well." *Id.* at 41-42. Mrs. Jones told Dr. Globus that Karis' father had sexually molested Karis' half-sister. Pet. App. C at 75. According to the doctor's final report, "Karis' father and stepfather's abusive attitude toward his mother set the scene for the development of an acceptance of violence as the solution to social and interpersonal problems and a low opinion of women." Pet. App. A at 41-42.

Despite learning this, trial counsel failed to do any further investigation. Then, one week before the penalty phase hearing, trial counsel decided not to call Dr. Globus as a witness or use the report trial counsel had had for months because he concluded it contained information possibly damaging to Karis. *Id.* at 42. Although this decision may have been grounded in concern that Dr. Globus' testimony could damage Karis'

case, having failed to pursue any other source of mitigation evidence of Karis' family history of abuse, trial counsel had no other evidence available to show the violence and abuse in Karis' childhood. *Id.* at 52.

The prejudice Karis suffered from trial counsel's unreasonable failure not to investigate and present evidence of childhood violence and abuse was graphically displayed at the district court's evidentiary hearing. There, Mrs. Jones testified that Karis' father, James Karis Sr., repeatedly and viciously abused her throughout their marriage and after their divorce. *Id.* at 44-46. As a small child, Karis not only witnessed the abuse of his mother, he was also a target of his father's violence. *Id.* at 45-46. Mrs. Jones described how after the divorce, Karis would return home from visits with his father with "some kind of injury – bruises on his legs, or something else that hurt him." *Id.* at 46. After one visit with his father, Karis returned home "crying uncontrollably" because of a circle-shaped burn on his hand. Pet. App. C at 89. James Sr. claimed the burn was accidentally caused by a car cigarette lighter. *Id.* at 90.

When Mrs. Jones later remarried, Karis' stepfather, Courtney Jones, continued the violence and abuse. Mrs. Jones testified how Jones would "beat the living daylights out of" her, how he repeatedly kicked and punched her, and how he threatened her with death. Pet. App. A at 47. She also testified that Jones was an alcoholic. Pet. App. C at 88. Jones also beat and abused Karis. Pet. App. A at 47-48, 50. According to Mrs. Jones, "Courtney used his big trucker's belt to beat Jimmy black and blue." Pet. App. C at 91. Jones also emotionally abused Karis, pitting Karis and his half-brother against each other and constantly referring to Karis as "just a stupid wop kid." *Id.* As a result

of Jones' "beatings, whippings, and threats," Karis was "scared to death" of his stepfather. *Id.*; Pet. App. A at 48.

Trial counsel also failed to investigate the childhood violence and abuse through questioning other family members. At the district court evidentiary hearing, several of Karis' family members testified that they were aware of the violence and abuse that Karis and his mother suffered. Pet. App. A at 48. Karis' uncle, Anthony Cancilia, testified that James Sr. admitted that he had sexually molested Karis. Pet. App. C at 89. Mrs. Jones' sister-in-law testified that she knew James Sr. was abusing Mrs. Jones during their marriage. Pet. App. A at 48. She further testified that when she cared for Karis after he had visited his father, Karis was "hard to control, easily upset, and cried a lot for no apparent reason." *Id.* at 48-49. Mrs. Jones' sister testified that she knew James Sr. "was always beating Marie up." *Id.* at 49. Even James Sr.'s brother "recalled that Jim was violent with Marie, and [that he] saw her with black eyes and bruises many times." *Id.* at 49. Mrs. Jones' family was also aware of Courtney Jones' abuse of her and Karis. *See* Pet. App. C at 86. Family member Robert Pullin testified that "everyone in the family knew Courtney beat Marie." *Id.* In addition, trial counsel failed to pursue independent sources of evidence, such as the 1961 divorce petition in which Mrs. Jones alleged extreme cruelty on the part of Courtney Jones. Pet. App. A at 48.

In *Karis v. Calderon*, Pet. App. A, the Ninth Circuit Court of Appeals upheld the district court's reversal of Karis' death sentence after finding that "the failure of counsel to present mitigating evidence made the sentencing neither fair nor reliable." *Id.* at 54. In reaching this conclusion, the Ninth Circuit relied on the test promulgated by this

Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In applying *Strickland*, the Ninth Circuit found that Karis' trial counsel's failure to pursue substantial and wrenching evidence of violence and abuse during Karis' childhood constituted deficient performance. Pet. App. A at 52. Although such evidence was available to trial counsel at the time of the penalty phase trial, trial counsel failed to offer any rational justification or strategy for not investigating the history of violence and abuse. *Id.* at 42, 48-49, 51. Because such "powerful and potentially life-saving" evidence was critical to the jury understanding Karis' violence toward women, the court concluded trial counsel's ineffective assistance prejudiced Karis. *Id.* at 48, 50, 53. Consequently, the Ninth Circuit upheld the district court's grant of penalty phase relief. *Id.* at 7.

III.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit's Decision Comports With *Strickland*.

While purporting to uphold the Supreme Court's prior decision, the State, by way of this petition, actually seeks to impose a deference standard far outside this Court's jurisprudence that would be fatal to virtually every ineffective assistance of counsel claim. In the process, the State grossly mischaracterizes the Ninth Circuit's decision and the record on which it was based. The State suggests that the Ninth Circuit's unremarkable application of the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), has "ominous implications." Pet. at 7. However, what is truly ominous is the State's contention that "deference" requires that any claim by trial counsel of "strategy," no matter how unsupported by fact or reason, trumps a

defendant's Sixth Amendment guarantee of effective assistance of counsel. Under the State's view, courts are reduced to rubber stamping trial counsel's performance, even when that performance falls far below accepted professional standards. *Strickland*, 466 U.S. at 690. *Strickland* does not permit this result, much less compel it. *See id.*

Strickland requires "a court deciding an actual ineffectiveness claim . . . [to] judge the reasonableness of trial counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* This is exactly what the Ninth Circuit did in *Karis*. In its opinion, the Ninth Circuit exhaustively reviewed the extensive record of evidence not presented at Karis' trial but presented at the evidentiary hearing showing Karis' horrific family upbringing. Pet. App. A at 32-51. In light of *Strickland*, *Burger v. Kemp*, 483 U.S. 776 (1987), and *Williams v. Taylor*, 529 U.S. 362, 396 (2000), the Court reviewed both the standard of care that applied at the time of Karis' 1982 trial and the evidence Karis produced at the evidentiary hearing—evidence that was available to trial counsel at the time of the 1982 penalty phase trial. Pet. App. A at 48-49. It was only *after* this review that the panel majority comprised of former Chief Judge Hug and former Chief Judge Browning concluded that the district court had correctly found that trial counsel's failure to investigate and present this "powerful and potentially life-saving evidence" prejudiced Karis during the penalty phase. *Id.* at 48, 53.

In explaining its decision, the Ninth Circuit noted that at the penalty phase hearing, trial counsel presented mitigation evidence that lasted for only forty-eight minutes, and that this evidence consisted almost entirely of "testimony that Karis was

artistic and had academic potential." *Id.* at 49-50. Significant to the court was trial counsel's omission of "substantial and wrenching evidence of Karis' violent and abusive childhood," even though trial counsel was aware of it at the time. *Id.* at 50. Trial counsel neglected to present "*any* evidence of such substantial abuse to the jury for consideration in making a life or death determination." *Id.* at 49. (emphasis in original). Moreover, the court found there was "no risk of putting on evidence of the wrenching abuse of Karis and his mother." *Id.* at 52.

Because trial counsel failed to undertake an investigation necessary to support a reasonable professional judgment, the court could find no basis to conclude that Karis' trial counsel had made a strategic decision regarding his penalty phase representation. *Id.* at 50-52. Simply put, trial counsel had "no strategic reason" and "no rational justification" for failing to investigate or present evidence of wrenching abuse that posed no risk to his client. *Id.* at 51-52.

Before reaching its conclusion that trial counsel's failure constituted deficient performance, the Ninth Circuit performed *Strickland's* two-part inquiry, noting that under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 33-54; *see also Strickland* at 690-91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). In defining the "objective standard of reasonableness," the court cited Karis' *Strickland* expert who "testified without contradiction that the standard of practice [in 1982] required trial counsel to investigate,

prepare and consider presenting evidence of the client's family history, including family dynamics, any physical abuse, mental and physical illness, and the family's socioeconomic status."[3] Pet. App. A at 34 n.9. The State "presented no expert opinion to the contrary." *Id.* at 35. Indeed, the State admitted that this was the standard in its opening brief in the Ninth Circuit when it "cited to testimony of guilt phase counsel that in 1982 an attorney was expected to present mitigation in the form of childhood problems." *Id.* at 49 n.10.

The State suggests that the Ninth Circuit's finding of ineffectiveness rests primarily upon trial counsel's failure to question Karis' mother about the abuse she and Karis suffered at the hands of Karis' father and stepfather. Pet. at 6, 8, 10-11. This is incorrect. The Ninth Circuit relied on the district court's finding that trial counsel's failure to investigate or present any of the "substantial and wrenching evidence of Karis' violent and abusive childhood" was unreasonable and that trial counsel had offered no "strategic reason" or "rational justification" for this failure. Pet. App. A at 50-51. Indeed, trial counsel "testified that he was unsure why he did not interview" Karis' cousin and close personal friend Danny Howell. Pet. App. C at 73. Although

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[3] According to the *Strickland* expert's testimony,

> Penalty phase counsel was required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history. In particular, defense counsel was required to attempt to find and interview: the client, members of the client's immediate family, relatives and acquaintances who were percipient witnesses to the life history of the client, his parents and his immediate family, friends.

Id. at 34 n.9.

trial counsel's decision not to question Mrs. Jones at trial about the abuse was part of this failure, the Ninth Circuit made it clear that trial counsel also should have investigated *other* sources of evidence of this family history using evidence available at the time of the penalty phase trial. Pet. App. A at 42. This point is underscored by the court's finding that there was no reasonable basis for trial counsel's failure to investigate or present *any* evidence of childhood violence or abuse, even accepting trial counsel's explanation for not questioning Mrs. Jones about it. *Id.* at 42, 49.

If he had investigated, trial counsel would have found that Mrs. Jones alleged extreme cruelty as the grounds for her 1961 divorce of Karis' stepfather. *Id.* at 48. In addition, several of Karis' family members testified at the district court's evidentiary hearing that they were aware of the abuse by Karis' father at the time the abuse took place, more than twenty years before the penalty phase.[4] *Id.* 48-49. Because the only explanation offered by trial counsel for his failure to investigate was his decision not to call Dr. Globus or to question Karis' mother about the history of abuse, the court correctly concluded that trial counsel offered no strategic reason for his failure to pursue other sources of pertinent information. *Id.* at 51 ("Petitioner's trial counsel has provided no rational justification for his failure to pursue an investigation into petitioner's history of family abuse.").

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[4] Mrs. Jones sister and sister-in-law both testified that James Karis Sr. was abusive. *Id.* at 48-49. James Sr.'s own brother also testified that he knew James Sr. was abusive toward Mrs. Jones. *Id.* His half-brother, Anthony Cancilia, testified that Karis' father admitted that he had sexually molested Karis. Pet. App. C at 89. Mrs. Jones also told Dr. Globus that James Sr. had molested Karis' half-sister. *Id.* at 75.

Rather than engaging in "an impermissive retrospective approach based on evidence presented years after the trial," the Ninth Circuit reviewed the evidentiary showing *Strickland* requires of defendants who raise ineffective assistance claims. *Strickland*, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). Moreover, all the evidence of abuse Karis presented at the district court's evidentiary hearing was available to trial counsel at the time of the penalty phase trial. *See* Pet. App. A at 48–49. As noted above, this evidence existed independent of Karis' mother and Dr. Globus.

Misconstruing the facts on which the district court and the Ninth Circuit based their decisions, the State's petition repeatedly raises trial counsel's *claim* that Mrs. Jones denied the family history of abuse. Pet. at 5. Mrs. Jones' testimony however, does not support that assertion, making it at least a factual issue. Pet. App. A at 42. This Court, moreover, is not a proper forum for resolving factual disputes. *See* Sup. Ct. R. 10 (stating that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"). Moreover, the State's recitation of disputed facts regarding Mrs. Jones' alleged unwillingness to testify does not demonstrate that trial counsel had an "express strategy." Pet. at 5. Even assuming Mrs. Jones would have denied the abuse, her denial does not constitute a "strategic reason" for trial

counsel's failing to investigate abuse and develop evidence from other sources.[5] Pet. App. A at 50-51. Rather, her alleged denial is one factor trial counsel would have to consider in choosing a penalty phase strategy. To arrive at an "express strategy," trial counsel needed to do more than simply question Mrs. Jones.[6] *See id.*

The State *speculates* that trial counsel *may* have been concerned that his failure to question Mrs. Jones about the abuse after others testified to it may have "struck the jury as suspicious" or that questioning her about it *may* have presented the potential for impeachment. Pet. at 8. However, *Strickland* requires that courts assess trial counsel's performance *at the time it was rendered*, not on the basis of the State's later theories about what possibilities trial counsel may have considered. *Strickland*, 466 U.S. at 690. Moreover, the State ignores two significant, irrefutable facts: (1) when Mrs. Jones testified about the violence and abuse at the evidentiary hearing, she was not impeached in any way, and (2) even if there were any significant concern about asking Mrs. Jones about the abuse, other witnesses were available to testify to the abuse if trial counsel had done an investigation. In any event, under *Strickland* defense counsel could not have properly made a strategic decision and weighed the strength of this testimony without first investigating the other sources of evidence and without knowing what that testimony would be. *See id.* at 691 ("Counsel has a duty to make reasonable

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5 Mrs. Jones' testimony at the evidentiary hearing, vividly recalling the violence and abuse, suggests she would not have denied the abuse if trial counsel had questioned her about it. Pet. App. A at 44-49.

6 Moreover, there was no evidence that penalty phase counsel ever explained to Mrs. Jones the importance of her testimony regarding Karis' abusive childhood as mitigation evidence. Pet. App. C at 79.

investigations or to make a reasonable decision that makes particular investigations unnecessary."), *cited in Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (1994) ("Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.").

Applying the 1982 standard of professional practice, the Ninth Circuit found that it "was within the range of reasonable tactics not to put [medical expert] Dr. Globus on the stand." Pet. App. A at 52. But that strategic decision "[did] not excuse the failure to present the evidence of abuse through other witnesses." *Id.* Similarly, the court noted that "[e]ven taking counsel's statements [regarding his reasons for not questioning Mrs. Jones about the abuse] as true, his failure to investigate the abuse through *other family members and witnesses* was error of constitutional magnitude." *Id.* at 42. (emphasis added).

By accepting trial counsel's statements as true—despite Mrs. Jones' testimony that trial counsel never asked her about abuse and Dr. Globus' testimony that Mrs. Jones told him about the abuse—the court afforded trial counsel a very high degree of deference. *Id.* Nevertheless, properly applying *Strickland*, the court concluded that trial counsel had offered "no strategic reason" for his failure to pursue other lines of investigation or to present evidence of abuse through other witnesses. *See id.* at 50-51. Even deferring to trial counsel's judgment, the court simply could not find any "rational justification" for trial counsel's failure to pursue other known sources of this evidence, and could not fathom how such a decision "might be considered sound strategy." *See id.*

The Ninth Circuit then turned to *Strickland's* prejudice prong, finding that trial counsel's failure "to investigate and present the highly relevant information of an abusive childhood was prejudicial" because "[a] reasonable probability exists that a jury would find this information important in understanding the root of Karis' criminal behavior and his culpability." *Id.* at 53. The court noted that the "prosecutor repeatedly stressed the absence of any testimony of mitigation throughout the penalty phase argument." *Id.* If trial counsel had undertaken a reasonable investigation, he would have been able to "put before the jury evidence contrary to the prosecution's piercing argument." *Id.* Such "powerful and potentially life-saving evidence at sentencing" would have been critical to the jury's life or death determination. *See id.* at 48. The fact that the jury deliberated over three days even without this evidence suggested to the court that "it is very likely that some jurors would have found such evidence particularly important in order to understand why he acted so violently towards women." *Id.*

Despite the State's attempted distortions of the Ninth Circuit's decision and the factual basis for it, *Karis* is merely a routine application of the *Strickland* standard to the particular facts presented. Ultimately, the court's decision reflects that, although in some circumstances trial counsel's failure to present mitigation evidence might be considered a reasonable strategic choice, this was not such a case. *See id.* at 51-52 (noting that *Burger* "has been distinguished in a number of cases in our circuit on the basis of this reasonable strategic choice"). At most, the State's argument is that the Ninth Circuit misapplied a properly stated rule of law. Even if that were true – which it

is not - the State's petition would still not satisfy this Court's standard for granting certiorari. *See* Sup. Ct. R. 10. (stating that certiorari "is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law"). In sum, the State's disappointment with the Ninth Circuit's application of *Strickland* in this case neither renders the court's analysis incorrect nor presents a sound basis for granting the State's petition. *See id.*

B. The Ninth Circuit's Decision Comports With *Burger*.

Like the State's analysis of *Strickland*, the State's analysis of *Burger v. Kemp*, 483 U.S. 776 (1987), is also wrongheaded. According to the State, *Burger* compels the Ninth Circuit to find that Karis received effective assistance simply because Karis' trial counsel presented some mitigation evidence during the penalty phase. Pet. at 7. But *Burger* did not rest on such a simplistic analysis of the mitigation evidence presented. If it had, *any* mitigation presentation, no matter how irrelevant, deficient, or damaging to defendant, would be fatal to a claim of ineffective assistance merely because it was more than what Burger's counsel did. More importantly, the State glosses over *Burger's* holding that a decision to forego presentation of mitigation evidence is effective assistance *only* when it is supported by reasonable professional judgment. *Burger*, 483 U.S. at 794.

Although both *Burger* and *Karis* involved defendants sentenced to death by juries that did not hear evidence of a family history of abuse, the similarity ends there. The most significant distinction between *Karis* and *Burger* is that Burger's counsel actually conducted an adequate investigation *before* making an informed, strategic decision not to present mitigation evidence. *Id.* at 792-94. In contrast to *Karis*, Burger's counsel

interviewed every potential witness called to his attention, hired and consulted with a psychological expert, and reviewed available medical reports.[7] *Id.* at 790-91. From this investigation, counsel concluded that his client would not be helped by the introduction of the evidence uncovered, because it would open the door to Burger's criminal record and other damaging historical facts otherwise unknown to the jury. *Id.* at 792-94. It was only *after* this thorough investigation that counsel selected his trial strategy and abandoned his search for further mitigation evidence. *Id.* at 795.

Unlike Burger's counsel, Karis' trial counsel only interviewed three of Karis' family members: Karis' mother, aunt, and his brother who had suffered brain damage. Pet. App. A at 42. Although trial counsel did consult with a medical expert, he decided not to use the expert's testimony about family violence and childhood abuse *only one week* before the penalty phase hearing. *Id.* at 41-42. Although trial counsel claimed his failure to question Mrs. Jones about the abuse was due to uncertainty about what she would say and her potential denial, he failed to explain why he did not question Karis' aunt or other family members about abuse and why he did not pursue other avenues of investigation. *Id.* at 42; Pet. App. C at 73 (noting that counsel was "unsure" why he failed to call Karis' cousin and personal friend Danny Howell). These family members could have testified to the physical, emotional, and sexual abuse suffered by Karis. Pet. App. C at 86, 89, 90. Rather than a strategic decision, the court found that trial counsel's

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[7] Counsel questioned Burger's mother on several occasions. *Id.* at 790-91. He also interviewed a family friend, as well as several people stationed at the same military base as Burger. *Id.* Counsel employed a psychologist to examine Burger and reviewed the results of that examination. *Id.* He also obtained and reviewed Burger's pre-existing psychological records. *Id.*

weak mitigation case resulted from the eleventh-hour abandonment of his plan to present evidence of family violence and childhood abuse through Dr. Globus. Pet. App. A at 52. "When the decision was made shortly before trial not to call Dr. Globus, the lack of thorough investigation left Karis' attorney unprepared to present what he had intended to be his major mitigating evidence." *Id.*

In further contrast to *Karis*, every affidavit later filed by Burger to describe the type of evidence his counsel should have uncovered included references to harmful facts not otherwise disclosed to the jury. *Burger*, 483 U.S. at 793. Worse still, the affidavits' references to Burger's "violent tendencies" contradicted defense counsel's "strategy of portraying [Burger's] actions on the night of the murder as the result of [accomplice] Stevens' strong influence upon his will." *Id.* Consequently, "there was a reasonable basis for [counsel's] strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id.* at 794-95. Once "[h]aving made this judgment, [counsel] reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about Burger's past." *Id.* at 795.

Demonstrating due deference, the Ninth Circuit held that Karis' trial counsel's decision not to call Dr. Globus was grounded in concern that the doctor's report contained damaging information and was thus "within the range of reasonable tactics." Pet. App. A at 42-52. However, that did not excuse trial counsel's failure to call or even question other witnesses, particularly since "counsel was admittedly on notice from Dr. Globus' report of substantial family abuse." *Id.* at 42. Unlike *Burger* where the

record contained "absolutely no evidence that petitioner had any criminal record of any kind," *Burger*, 483 U.S. at 792, the jury in *Karis* had already learned of Karis' two prior rape convictions through the testimony of prior victims. Pet. App. A at 60. Because the jury already knew of Karis' most heinous offenses, Karis had nothing to lose by trial counsel's presentation of the evidence. *See id.* In stark contrast to *Burger*, in *Karis*, both the district court and the Ninth Circuit found that there was "no risk of putting on evidence of the wrenching abuse of Karis and his mother." *Id.* at 51.

Instead of presenting evidence of abuse, trial counsel was left to counter the testimony of two rape victims with evidence of Karis' artistic ability and intelligence. *Id.* at 52. He presented no evidence "of Karis witnessing his father and his stepfather viciously beat his mother, in addition to both men beating and abusing Karis." *Id.* at 50. He presented no evidence of Karis' molestation. *See* Pet. App. C at 89. As the Ninth Circuit held, such evidence may have helped mitigate the testimony of the prior rapes by helping the jury "understand why [Karis] acted so violently toward women." Pet. App. A at 53. Indeed, the Ninth Circuit could imagine no standard that "would allow counsel to rely almost solely on testimony that Karis was artistic and had academic potential to present a mitigating case, while failing to present *any* evidence of such substantial abuse to the jury for consideration in making a life or death determination for Karis." *Id.* at 49 (emphasis in original). Instead of challenging the prosecution's case, trial counsel's meager mitigation evidence actually provided the prosecution

fodder for its argument in favor of death.[8] Had trial counsel presented the wrenching evidence of the brutal physical, sexual and emotional abuse Karis suffered as a child, the prosecution could not have done so. *Id.* at 50.

Once the fundamental differences between the two cases are considered, *Karis* becomes entirely consistent with *Burger*. *Burger* simply holds that trial counsel need not "mount an allout investigation into petitioner's background in search of mitigating evidence" when preliminary interviews and investigation reasonably lead counsel to conclude that introducing the evidence likely to be uncovered would do more harm than good. *Burger*, 483 U.S. at 793-95. That principle has no application here, because Karis had everything to gain, and nothing to lose, from trial counsel's investigating and introducing evidence about his violent upbringing. *See* Pet. App. A at 51. Here, as in *Williams v. Taylor*, 529 U.S. 362 (2000), trial counsel's "fail[ure] to conduct an investigation that would have uncovered extensive [evidence] graphically describing [Karis'] nightmarish childhood" demonstrated that "trial counsel did not fulfill [his] obligation to conduct a thorough investigation of the defendant's background." *Id.* at 395-96. This failure constituted constitutionally deficient performance that "prejudiced

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[8] In closing argument, the prosecutor maintained that

> [W]e see Mr. Karis, not as an impoverished individual, not somebody who was void of talents, who's devoid of intellectual capacity, not somebody who, by virtue of being so poor as an individual, so lacking in ability was warped into being a killer. No, on the other hand, Mr. Karis has all of the ability, but he changed his life into that of visiting evil destruction and death on fellow human beings. . . . [D]espite Mr. Karis' abilities, despite his intellectual capacity, despite all of his talents, he has turned to base and immoral purposes.

Id. at 52-53.

[Karis] within the meaning of *Strickland*." *Williams*, 529 U.S. at 395-96. Accordingly, this Court should reject the State's petition for certiorari.

C. The Ninth Circuit's General Mode Of Analysis Is Sound.

Recognizing the weakness of its argument, the State attempts to bolster its petition by mischaracterizing Judge Hug's Ninth Circuit's opinion as "the apex of a pyramid of cases in which the Ninth Circuit has second-guessed counsel's decisions and applied the fabled twenty-twenty vision of hindsight, rather than applying the strong deferential presumption that trial counsel's conduct might be considered sound trial strategy." Pet. at 10.

Contrary to the State's claim, the Ninth Circuit has not instituted a "general mode of analysis" that gives no deference to trial counsel's decisions attacked by ineffective assistance of counsel claims ("IAC claims"). *Id.* Instead, the Ninth Circuit has applied *Strickland's* standard on a case-by-case basis, as decisions by this Court require. *See Williams*, 529 U.S. at 391 (holding that "of necessity," *Strickland* "requires a case-by-case examination of the evidence") (*quoting Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring)); *see also Strickland*, 466 U.S. at 699. Predictably, this case-by-case application has resulted in the rejection of some IAC claims and the acceptance of others.

The *Karis* decision itself disproves the State's argument that the Ninth Circuit uniformly accords no deference to counsel's avowedly strategic decisions. Karis did not just raise *one* IAC claim – he raised *four*. Employing *Strickland* deference, the Ninth Circuit rejected three of these, explicitly holding that trial counsel's conduct was

"reasonable." Pet. App. A at 26-29. Likewise, the Ninth Circuit applied *Strickland* deference to reject the petitioners' IAC claims in *Williams v. Cal. State Prison*, 306 F.3d 665, *117-18 (9th Cir. 2002), *Hayes v. Woodford*, 301 F.3d 1054, 1068 (9th Cir. 2002), *Franklin v. Johnson*, 290 F.3d 1223, 1234-37 (9th Cir. 2002), *Landrigan v. Stewart*, 272 F.3d 1221, 1225 (9th Cir. 2001), *Anderson v. Calderon*, 232 F.3d 1053, 1094 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 580 (2001), *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) and *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997), among other cases. Although the State would clearly prefer it, the Ninth Circuit's "mode of analysis" does *not* always yield the same result.

In truth, the State does not want the Ninth Circuit to apply *Strickland*, it wants it to apply a standard that compels the Court to defer to *any* claim of strategy no matter how unreasonable. The State's complaint about the Ninth Circuit's decision in *Wade v. Calderon*, 29 F.3d 1313 (9th Cir. 1994), demonstrates this point. *See* Pet. at 11. In *Wade*, counsel argued that a death sentence would be a "gift of life" to his client and failed to present mitigation evidence of abuse in his possession during the penalty phase. *Wade*, 29 F.3d at 1323-25. The Ninth Circuit found it unreasonable for Wade's counsel to forego presenting available mitigation evidence in favor of arguing in support of the execution of his own client. *See id.* The State's standard would require the Ninth Circuit to defer even when counsel's performance is this deficient. This is the standard the State conceives, but it is clearly not *Strickland's* standard.

The State's attempt to replace Strickland's standard with an exceedingly deferential one is further exemplified by its inability to discern the difference between

Burger and every other case in which the Ninth Circuit found ineffective assistance. The Court found that *Burger's* counsel provided his client effective assistance because the preliminary investigation he conducted gave him a "reasonable basis for his decision" to forego presentation of certain mitigation evidence. *Burger*, 483 U.S. at 794-95. Burger's counsel halted his investigation only *after* he reasonably became convinced him that Burger's "history would not have minimized the risk of the death penalty." *Id.* But, in each of the cases the State cites, the court found just the opposite: that counsel's performance was *not* supported by reasonable investigation and thus was *not* the result of a tactical decision.[9] *See* Pet. App. A at 51-52 (noting that "*Burger* has been

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[9] *See, e.g., Gentry v. Roe*, 300 F.3d 1007, 1113-14 (9th Cir. 2002) (finding counsel's performance deficient because counsel's closing argument failed to argue that state failed to meet its evidentiary burden, omitted facts helpful to defendant, highlighted immaterial, damaging evidence, and referred to client as "jailbird," "drug addict," and "stinking thief"); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (noting that "at a minimum, [counsel must] conduct a reasonable investigation enabling him to make informed decisions about how to best represent client" and concluding that counsel's failure to interview conflicting eyewitnesses regarding petitioner's role in shooting before selecting defense constituted deficient performance prejudicial to petitioner); *Visciotti v. Woodford*, 288 F.3d 1097, 1111-14 (9th Cir. 2002) (finding deficient performance where counsel failed to investigate and discover mitigating evidence of "overwhelming mitigating circumstances in an absolutely horrendous family history" because of ignorance of types of evidence jury could consider), *rev'd on other grounds, Woodford v. Visciotti*, 2002 U.S. LEXIS 8312 (U.S. Nov. 4, 2002); *Phillips v. Woodford*, 267 F.3d 966, 980 (9th Cir. 2001) (noting that trial counsel admitted to believing alibi defense presented was unreasonable and that he would have presented alternative defense if he had certain evidence, which was later determined to be in his possession at time of trial), *cert. denied* Oct. 21, 2002 (issue concerned right to self-representation); *Jackson v. Calderon*, 211 F.3d 1148, 1162 (9th Cir. 2000) (finding ineffective assistance where counsel failed to investigate or prepare readily available mitigation evidence because counsel did not expect to reach penalty phase and did not believe evidence would help once "guilt phase [was] over"), *cert. denied, Woodford v. Jackson*, 531 U.S. 1072 (2001); *Caro v. Calderon*, 165 F.3d 1223, 1224 (9th Cir. 1999) (remanding for evidentiary hearing on counsel's failure to investigate affect of chronic and extensive exposure to pesticides on

distinguished in a number of cases in our circuit on the basis of this reasonable strategic choice"); *Silva v. Woodford*, 279 F.3d 825, 844 (9th Cir. 2002) (noting that decisions in *Burger* and similar cases denying ineffective assistance claims all came in cases in which "trial counsel had already investigated and prepared such evidence beforehand so as to make an informed decision about trial strategy and had reasonable grounds for electing to present such evidence at trial"). Notably, this Court has declined to review nearly every Ninth Circuit decision about which the State complains. *See, e.g. Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002), *cert. petition filed* Oct. 18, 2002; *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002), *cert. denied, Woodford v. Caro*, 122 S.Ct 2645 (2002); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002), *cert. denied, Woodford v. Silva*, 2002 U.S. LEXIS 7365 (U.S. Oct. 7, 2002); *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001), *cert. denied* Oct. 21, 2002; *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000), *cert. denied, Woodford v. Jackson*, 531 U.S. 1072 (2001); *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999)), *cert. denied, Woodford v. Caro*, 527 U.S. 1049 (1999); *Wade v. Calderon*, 29 F.3d 1313 (9th Cir. 1994), *cert. denied, Calderon v. Wade*, 513 U.S. 1120 (1995). [10]

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defendant's mental ability), *cert. denied, Woodford v. Caro*, 527 U.S. 1049 (1999); *Wade v. Calderon*, 29 F.3d 1313, 1323-25 (9th Cir. 1994) (finding ineffective assistance where counsel failed to re-present guilt phase evidence of abuse in mitigation during penalty phase and argued death penalty would be "an escape" and "gift of life" freeing defendant from mental illness), *cert. denied, Calderon v. Wade*, 513 U.S. 1120 (1995).

[10] This Court recently reversed the Ninth Circuit 's opinion in *Viscotti v.* Woodford, 288 F.3d 1097 (9th Cir. 2002). *See Woodford v. Visciotti*, 2002 U.S. LEXIS 8312 (U.S. Nov. 4, 2002) (per curiam). However, *Visciotti* is not analogues to the present case. *Visciotti* was decided using post-AEDPA standards of 28 U.S.C. 2254(d), which permit a federal court to grant a habeas petition only if the state court decision is both an incorrect and an unreasonable application of clearly established federal law. *Woodford v. Visciotti*, 2002 U.S. LEXIS 8312, at *13 (U.S. Nov. 4, 2002) (per curiam); *see* § 2254(d);

The Ninth Circuit may not be employing the standard the State desires, but *it is* applying the *Strickland* standard. For this reason also, this Court should deny the State's petition for certiorari.

IV.

CONCLUSION

The Ninth Circuit did not hold, as the State would have this Court believe, that Karis' trial counsel should have conducted a "scorched earth" investigation to provide constitutionally adequate representation. Pet. at 13. Rather, it upheld the district court's finding, made after a three-week evidentiary hearing, that there was no strategic reason for trial counsel's failure to pursue and present for the jury's life or death determination readily available evidence that Karis was the victim of substantial and wrenching childhood violence and abuse. *Strickland* and *Burger* do not just permit the Ninth Circuit's conclusion; they compel it. The State's contrary assertion is an attempt

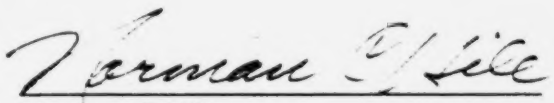
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Williams v. Taylor, 529 U.S. 362, 410-11 (2000). In contrast, the pre-AEDPA standard applies to *Karis*. Pet. App. A at 18 n.1. Under the pre-AEDPA standard, federal courts may reverse an incorrect state court conclusion, even if the conclusion is reasonable. *Williams*, 529 U.S. at 410-11. Moreover, even under the post-AEDPA standard, *Visciotti* is inapplicable as it involved the Ninth Circuit's reversal of a California Supreme Court decision on the merits reached after an evidentiary hearing. *In re Visciotti*, 14 Cal. 4th 325, 356-57, 926 P.2d 987, 1006 (1996). In *Karis*, however, the state court never ruled on the merits of Karis' ineffective assistance claims and never held an evidentiary hearing. *See* Pet. App. A at 15 (noting that California Supreme Court rejected Karis' appeal without holding evidentiary hearing); *Karis v. Vasquez*, 828 F.Supp. 1449, 1466 (E.D. Cal. 1993). Rather, the only evidentiary hearing regarding Karis' claims was in the U.S. district court. *See* Pet. App. A at 15-16. Thus, the desire for comity expressed in § 2254(d) is not at issue here, since there is no state court decision on the merits of Karis' claim. *See Woodford v. Visciotti*, 2002 U.S. LEXIS 8312, at *8.

to eviscerate the Sixth Amendment right to counsel by adopting a standard so deferential as to be meaningless.

Because the opinion of the Ninth Circuit is entirely consistent with *Strickland*, *Burger* and *Williams*, the State's petition for certiorari should be denied.

Respectfully submitted,



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No. 02-434

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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that a prisoner alleging ineffective assistance of counsel under the Sixth Amendment must overcome the strong presumption that his trial counsel's conduct, including conduct relating to investigations, "might be considered sound trial strategy[]" and that counsel's conduct must be evaluated from counsel's perspective at the time without the temptation to second-guess or the "distorting effects of hindsight[.]" In *Burger v. Kemp*, 483 U.S. 776 (1987), this Court held that there was a "reasonable basis" for trial counsel's strategic decision not to call the defendant's mother as a witness since he concluded her testimony would be unhelpful and potentially counterproductive. Trial counsel in the instant capital case did not present evidence of the family abuse experienced by the defendant's mother and the defendant as mitigating evidence because "he did not know what [the mother] would say[,]" "she had denied the abuse[,]" she had twice lied to the police about the defendant, neither defendant nor the mother were forthcoming about her "prior life[,]" and he did not want to open the door to damaging background information that the mother knew about Karis. The Ninth Circuit Court of Appeals held that counsel's decision was not a reasonable strategic decision and vacated the penalty phase for ineffective assistance of counsel. The questions presented are:

1. Whether the Ninth Circuit's reversal of a penalty phase for ineffective assistance of counsel conflicts with *Strickland v. Washington* and *Burger v. Kemp*, since trial counsel opted not to investigate further, or introduce in mitigation, evidence that the defendant and the defendant's mother had been abused, for the strategic reason that the mother had denied the abuse, had lied to the police, neither the

defendant nor his mother wanted counsel to pursue the mother's "prior life[,]" and counsel did not want to open the door to damaging background information that the mother knew about Karis.

2. Whether the Ninth Circuit is engaging in a mode of analysis of ineffective assistance of counsel which conflicts with *Strickland v. Washington* and *Burger v. Kemp* by utilizing "hindsight" and second-guessing to reject trial counsel's articulated tactical reasons for choosing to conduct a "less than complete" investigation when, under the circumstances at the time of trial, those express reasons are sufficient to support the strong, deferential presumption that trial counsel's conduct "***might*** be considered sound trial strategy[.]" (Emphasis added.)

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-434

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

ARGUMENT

Karis was convicted and sentenced to death for kidnaping two women, raping one, and murdering the other. Prior to Karis's penalty phase, his trial counsel investigated and developed evidence through a psychiatrist that Karis and his mother were abused when Karis was a child. (App. C at 75, 76). However, Karis's counsel ultimately made a strategic decision not to present this evidence because, when, prior to the penalty phase, Karis's counsel asked Karis's mother about the abuse, she denied that it had occurred. (App. C at 76.) Moreover, neither Karis nor Karis's aunt told counsel about abuse. (App. C at 76.) Although counsel conducted a determined investigation of abuse evidence, he declined to present abuse evidence because he did not believe he could risk presenting such evidence if Karis's mother could not be relied up to corroborate it. (*See* App. A at 64 [Kleinfeld, J., concurring and dissenting].) Despite this Court's admonition in *Strickland v. Washington*, 466 U.S. 668 (1984), to avoid hindsight and to presume that counsel's conduct, "'might be considered sound trial strategy[]'" (*id.* at 689), the Ninth Circuit

reversed Karis's penalty.

The Ninth Circuit's decision exemplifies an ongoing debate about counsel's duty to investigate under *Strickland* and *Burger v. Kemp*, 483 U.S. 776 (1987). It is the issue already confronting this Court in *Wiggins v. Corcoran*,[1] in which counsel made a strategic decision not to investigate and develop mitigating evidence. *See Wiggins v. Corcoran*, 288 F.3d 629, 639-43 (4th Cir. 2002).[2] This issue has also been a decisive one in the Ninth Circuit cases cited in the petition for writ of certiorari in this case. (Petition at 11-12.)

Karis mischaracterizes the Ninth Circuit's opinion as just another "unremarkable" and "routine" "case-by-case" application of *Strickland*. (Brief in Opposition ["Opp'n"] at 7, 15-16, 21.) However, the Ninth Circuit's opinion reveals otherwise:

> It is difficult to imagine what kind of standard the State conceives would allow counsel to rely almost solely on testimony that Karis was artistic and had academic potential to present a mitigating case, while failing to present *any* evidence of such substantial abuse to the jury for consideration in making a life or death determination for Karis.

(App. A at 49, emphasis in original.)

The absolutist rhetoric of the Ninth Circuit and Karis's Opposition begs the question. The "unimaginable" standard the State advocates is *Strickland*–a deferential standard

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1. Certiorari granted on November 18, 2002, in case No. 02-311.

2. The State acknowledges that *Wiggins* is being reviewed under the Antiterrorism and Effective Death Penalty Act, while this case is not. *See Wiggins*, 288 F.3d at 636. However, both *Wiggins* and this case involve similar ineffective counsel issues: whether counsel is required to present social history mitigation evidence. *See id.* at 639-43.

based on an attorney's reasonable strategic decision that presenting potentially unreliable evidence of abuse would be tactically risky.[3/] The Ninth Circuit's disposition cannot be disguised as just the misapplication of a properly stated rule of law–it is an overarching redefinition of the governing standard in ineffective assistance of counsel cases which mandates introduction of abuse evidence even when that is against the better judgment of defense counsel.

Karis's counsel conducted an extensive penalty phase investigation which included investigating drug use, mental illness, and Karis's military records. (App. C at 75, 96-103.) Karis's counsel did develop evidence of childhood abuse by retaining a psychiatrist, Dr. Albert Globus. (App. C at 75.) There is no dispute that counsel made a reasonable tactical decision a week before the penalty phase began not to call Dr. Globus because of damaging information in his psychiatric report. (Opp'n at 18.) The Ninth Circuit and Karis fault counsel for not having a "Plan B" in lieu of Dr. Globus. (Opp'n

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3. Karis mistakenly asserts that his *Strickland* expert testified to the applicable standard of care without contradiction. (Opp'n at 9, 10.) In fact, the State presented the declaration of its own *Strickland* expert, the Honorable Sheldon Grossfeld, the judge who presided over the 1982 trial, who opined that counsel's representation was adequate and proper and met an objective standard of reasonableness under *Strickland.* (Opening Brief of Respondent–Cross-Appellant/Appellee, filed in the Ninth Circuit ["OBR"], at 28-29, 30-31.)

Karis also claims that he was sexually molested by his father. (Opp'n at 4, 6, 11 n.4.) The only support for this assertion is the declaration of Karis's uncle, Anthony Cancilla. (*Id.*, citing Petitioner's App. C at 89.) However, Cancilla's declaration is not competent evidence: Karis's habeas counsel was unable to produce Cancilla for cross-examination. (OBR at 77-79.)

at 2; *see also* App. A at 42.)

However, counsel did have a "Plan B": the penalty phase defense that was actually presented. Counsel had strategic reasons for declining to question Karis's mother about the abuse: Karis's mother might have denied the abuse (possibly to protect her relationship with Karis's stepfather), and such questioning might have opened the door to damaging background information that she had about Karis (a robbery Karis was involved in as a juvenile; his military discharge; his attempted prison escape; his involvement in a prison incident–which resulted in a killing). (Petition for Writ of Certiorari at 8.) If other witnesses had been used to elicit the abuse evidence, but Karis's mother was not asked about it, or if she was asked and denied it, the absence of such testimony or her denials might at a minimum have struck the jury as suspicious. (*Id.*)

Further, questioning Karis's mother about abuse might also have enabled the prosecutor to impeach her on the ground that she had previously lied to police on Karis's behalf. (Petition for Writ of Certiorari at 8; *see also* Supplemental Appendix attached to this brief.)[4] Counsel's strategically limited questioning avoided such impeachment. Even if the prosecutor had been able to show that Karis's mother had lied to police, this would have done little to impeach the limited testimony she gave at the penalty phase (e.g., that Karis saved his half-brother from drowning). Thus, counsel had sound tactical reasons for acting as he did. The Ninth Circuit's

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4. The Supplemental Appendix consists of a 1987 declaration by the trial prosecutor which states that he could have demonstrated the falsity of one of Karis's mother's alibi statements and which suggests that Karis's mother gave a false alibi in Karis's 1975 rape case. This declaration was part of the Supplemental Excerpts of Record (pages 5120-5121) filed in the Ninth Circuit.

disposition is the latest manifestation of that court's *per se* rule that counsel must always introduce social history evidence even when there are tactical reasons for declining to do so.

CONCLUSION

Accordingly, the petition for writ of certiorari should be granted. Alternatively, this Court should defer consideration of the petition until *Wiggins* is decided.

Dated: December 11, 2002

Respectfully submitted,

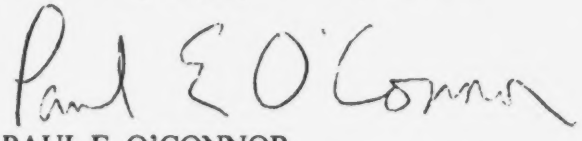
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Supplemental Appendix

DECLARATION OF RONALD TEPPER

I am the District Attorney for the County of El Dorado. In or around the summer months of 1982 I was the prosecuting attorney in the case entitled People of the State of California vs. James Leslie Karis, this matter being tried on a change of venue in Sacramento County, before the Honorable Sheldon Grosfeld, Judge of the Superior Court.

Prior to commencement of the trial I conferred frequently with Detective Thomas Southern, an officer in the employ of the Placerville City Police Department. It was my understanding that Detective Southern was the officer most familiar with the investigation of the crimes in issue and that he had a thorough and definitive knowledge of the case. In or around July of 1981 Detective Southern advised me that he had interviewed the defendant's mother, one Eva Maria Jones. Thereafter he furnished the Office of the District Attorney with a report of this interview. A copy of that report is attached hereto, Marked Exhibit "A" and by this reference made a part hereof. Based upon Detecitve [sic] Southern's report, and my understanding of the facts of the case, it was my belief that: (i) Eva Marie Jones had given a false statement to Detective Southern; (ii) that her statement could be demonstrated as being patently erroneous; and (iii) that the statement was given to attempt to provide an alibi and to exonerate her son.

In preparation for the penalty phase of the above described case, I had acquainted myself with a 1975 case wherein the defendant had been convicted of rape. The victim of this incident was interviewed by my Chief Investigator, Russell Herman, and a liason [sic] had been established with law enforcement officers involved in the 1975 investigation. I was advised by these officers that Eva Marie Jones, the defendant's mother, had been interviewed at or about the time of the 1975 incident and that she had provided the authorities with false information attempting to provide an alibi for her son.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: November 3, 1987

RONALD TEPPER

District Attorney

No. 02-434

COPY

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
FEB 3 2003
OFFICE OF THE CLERK

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF

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CAPITAL CASE
QUESTIONS PRESENTED

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that a prisoner alleging ineffective assistance of counsel under the Sixth Amendment must overcome the strong presumption that his trial counsel's conduct, including conduct relating to investigations, "might be considered sound trial strategy[]" and that counsel's conduct must be evaluated from counsel's perspective at the time without the temptation to second-guess or the "distorting effects of hindsight[.]" In *Burger v. Kemp*, 483 U.S. 776 (1987), this Court held that there was a "reasonable basis" for trial counsel's strategic decision not to call the defendant's mother as a witness since he concluded her testimony would be unhelpful and potentially counterproductive. Trial counsel in the instant capital case did not present evidence of the family abuse experienced by the defendant's mother and the defendant as mitigating evidence because "he did not know what [the mother] would say[,]" "she had denied the abuse[,]" she had twice lied to the police about the defendant, neither defendant nor the mother were forthcoming about her "prior life[,]" and he did not want to open the door to damaging background information that the mother knew about Karis. The Ninth Circuit Court of Appeals held that counsel's decision was not a reasonable strategic decision and vacated the penalty phase for ineffective assistance of counsel. The questions presented are:

1. Whether the Ninth Circuit's reversal of a penalty phase for ineffective assistance of counsel conflicts with *Strickland v. Washington* and *Burger v. Kemp*, since trial counsel opted not to investigate further, or introduce in mitigation, evidence that the defendant and the defendant's mother had been abused, for the strategic reason that the mother had denied the abuse, had lied to the police, neither the

defendant nor his mother wanted counsel to pursue the mother's "prior life[,]" and counsel did not want to open the door to damaging background information that the mother knew about Karis.

2. Whether the Ninth Circuit is engaging in a mode of analysis of ineffective assistance of counsel which conflicts with *Strickland v. Washington* and *Burger v. Kemp* by utilizing "hindsight" and second-guessing to reject trial counsel's articulated tactical reasons for choosing to conduct a "less than complete" investigation when, under the circumstances at the time of trial, those express reasons are sufficient to support the strong, deferential presumption that trial counsel's conduct "***might*** be considered sound trial strategy[.]" (Emphasis added.)

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-434

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

The Ninth Circuit recently filed a further amended opinion in *Gentry v. Roe*, No. 00-55691 (9th Cir. Jan. 28, 2003).[1/] The panel majority found that trial counsel rendered ineffective assistance during closing argument. *Id.* at 1262, 1273-1275.[2/] Rehearing en banc was denied. *Id.* at 1256. Judges Kleinfeld, O'Scannlain, T. Nelson, and Tallman dissented from the denial of rehearing en banc. *Id.* Judge Kleinfeld noted that the *Gentry* case was part of a developing Ninth Circuit jurisprudence in which the Ninth Circuit substitutes its judgment for that of defense counsel and the state courts. *Id.* at 1260. Judge Kleinfeld stated that this usually occurs in death penalty cases, but the trend is beginning to

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1. A copy of the opinion is attached. The opinion is paginated 1251-1280.

2. The State acknowledges that *Gentry* was reviewed under the Antiterrorism and Effective Death Penalty Act (AEDPA). *Gentry,* at 1256-57, 1262, 1268-69. The AEDPA standard does not apply to the present case (*Woodford v. Karis*).

encompass more routine cases. *Id.* As Judge Kleinfeld put it:

> This case is part of a developing body of circuit law substituting our judgment on defense tactics and presentation for the judgment of defense counsel and of state courts. Most often this occurs in death penalty cases, but the trend is seeping beyond them to more routine cases such as this one. The last thing criminal defendants and the public need is a Ninth Circuit "form book" of approved arguments and strategies, yet that's what we're giving them. We're telling them in great detail how to investigate their cases and forcing them down rabbit racks that divert their time from better applications, that they have to produce psychiatric evidence though often it's a bad idea, that they have to make an "Officer Krupke" argument[3] even where it will produce the same mocking response as it did in the song.[4]

Gentry, at 1260-61.

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3. "'Dear kindly Sergeant Krupke, / You gotta understand, / It's just our bringin' up-ke / That gets us out of hand. / Our mothers all are junkies, / Our fathers all are drunks. /Golly Moses, natcherly we're punks! Gee, Officer Krupke, we're very upset; / We never had the love that ev'ry child oughta get. / We ain't no delinquents, / We're misunderstood. /Deep down inside us there is good!' [¶] Stephen Sondheim, Gee, Officer Krupke, in West Side Story (1956), available at http://www.westsidestory.com/site/level2/lyrics/krupke.html (last visited, Jan. 9, 2003)." *Gentry*, at 1260-61 n.13

4. "*Id*[.] ('Officer Krupke, you've done it again. / This boy don't need a job, he needs a year in the pen. / It ain't just a question of misunderstood; / Deep down inside him he's no good!')" *Gentry*, at 1261 n.14.

Moreover, Judge Kleinfeld notes a number of recent Ninth Circuit cases which have second-guessed counsel. *Gentry*, at 1261 n.15. *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) is among these. Judge Kleinfeld lists the following cases:

> *See, e.g., Rios v. Rocha*, 299 F.3d 796 (9th Cir. 2002) (counsel interviewed his client and a witness before choosing a defense strategy but should have interviewed more witnesses); *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002) (counsel should investigate the possibility of an insanity defense even though pursuing an alibi defense); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (counsel must put on evidence of an abusive childhood); *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002) (counsel should present evidence of drug use and "difficult childhood"); *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001) (counsel must investigate a theory of defense that contradicts what his client has told him); *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) (counsel must present a brain damage from pesticides theory even if the medical experts he consults do not suggest it).

Gentry, at 1261 n.15.

Thus, Judge Kleinfeld's dissent from denial of en banc rehearing (which was joined by three other Ninth Circuit judges) supports the State's position that the Ninth Circuit is engaging in a mode of analysis that second-guesses trial counsel in violation of *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

Accordingly, the State's petition for writ of certiorari should be granted. Alternatively, this Court should defer consideration of the petition until *Wiggins v. Corcoran*, No. 02-311, is decided.

Dated: January 30, 2003

Respectfully submitted,

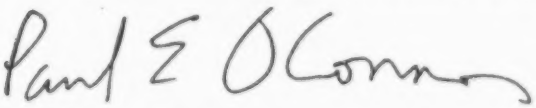
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PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIONEL E. GENTRY, Petitioner-Appellant, v. ERNIE ROE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 00-55691 D.C. No. CV-97-04867-ER-AN ORDER AND AMENDED OPINION AND AMENDED DISSENT

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
July 9, 2002—Pasadena, California

Opinion Filed August 8, 2002
Amended August 30, 2002
Further Amended January 28, 2003

Before: Procter Hug, Jr., Jerome Farris and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Farris;
Dissent by Judge Silverman

EDITOR'S NOTE

ORIGINAL PAGINATION IS NOT CONTINUOUS

COUNSEL

James H. Locklin, Deputy Federal Public Defender (argued), Los Angeles, California, for the petitioner-appellant.

Shawn A. McGahey (argued) and John R. Gorey, Deputy Attorney General of the State of California, for the respondents-appellees.

ORDER

The opinion filed August 8, 2002, and amended August 30, 2002, is further amended as reflected in the attached revised opinion. The dissent filed August 8, 2002, is also amended as reflected in the attached revised dissent.

With these amendments, Judges Hug and Farris voted to deny the petition for panel rehearing; Judge Silverman voted to grant the petition. Judge Silverman voted to deny the petition for rehearing en banc and Judges Hug and Farris so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

KLEINFELD, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, T. NELSON, and TALLMAN join, dissenting from denial of rehearing en banc:

The panel granted a 28 U.S.C. § 2254 habeas petition on the ground that defense counsel's closing argument fell below the Strickland[1] standard.

The panel has given lip service to the statutory habeas standard but hasn't followed it. The opinion gives inadequate deference both to the constitutional analysis of the Court of Appeal of the State of California and to the judgments of defense counsel about how best to argue for his client.

As Judge Silverman correctly pointed out in dissent, the law requires not only that counsel's performance was deficient and that the deficiency was prejudicial, but also that the state court of appeal's decision to the contrary was "objectively unreasonable," all the while "indulg[ing] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[2] The majority declared the state court's opinion was unreasonable, but made no attempt to show why. The only question we have jurisdiction to answer is whether the state court's opinion was "contrary

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[1]Strickland v. Washington, 466 U.S. 668 (1984).

[2]Bell v. Cone, 122 S. Ct. 1843, 1854 (2002) (internal quotation omitted).

to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[3] An ipse dixit just isn't enough.

As the Supreme Court recently pointed out, "[t]his readiness to attribute error is inconsistent with the presumption that state courts know and follow the law."[4] The majority makes precisely the error that another recent Supreme Court per curiam summary reversal pointed out, in that it "evaded" § 2254(d)'s requirement by "proceeding to a simple 'error' inquiry."[5] The state judges take the same oath we do, to support the United States Constitution,[6] and they get reviewed by the same court we do, the United States Supreme Court, so the habeas statute quite reasonably prohibits us from substituting our judgment for theirs. Moreover, the Supreme Court has reminded federal courts in the strongest language of our duty to read the state court decisions with the deference appropriate and required by law.

There's no Supreme Court decision upon which the majority relies except for Strickland.[7] The majority opinion doesn't quote the state court's Strickland-Cronic[8] analysis and try to show that it is unreasonable.

Nor can I make sense of why the majority opines that the state court decision on prejudice is unreasonable. A building security officer testified that he saw Gentry stab his girlfriend Handy, Handy was indeed stabbed, and Gentry admitted that he stabbed her — a "caught red-handed" sort of case. Though he had a long record of serious, violent crimes, Gentry said

[3]28 U.S.C. § 2254(d).

[4]Woodford v. Visciotti, 123 S. Ct. 357, 360 (2002).

[5]Early v. Packer, 123 S. Ct. 362, 366 (2002).

[6]U.S. Const. Art VI.

[7]Strickland v. Washington, 466 U.S. 668 (1984).

[8]United States v. Cronic, 466 U.S. 648 (1984).

he'd stabbed her accidentally. That was his defense. The noteworthy feature of counsel's performance is that by showing that the witnesses all told their stories in varying ways on different occasions, he managed to plant enough doubt to keep the jury out for six hours instead of six minutes.

The majority characterizes defense counsel's argument as "passive" and "meek," but without being in the courtroom, observing him through trial, and hearing his tone of voice, there's no basis for this. The trial judge, who was there, said he did "a highly competent job" but "there wasn't all that much that could be done for Mr. Gentry" in view of "the factual evidence."[9]

The majority faults counsel because "he mentioned a host of details that hurt his client's position," but it has long been understood to be desirable for defense counsel to "meet head on any key facts that are unfavorable to his cause," "face up to [defendant's] defects," and as an overall strategy to get the jury to listen to him, to "use candor and sincerity."[10] Lawyers are going to be chary of applying this tried and true (and desirable) strategy after they read the majority opinion deeming it below the minimal Strickland standard. Apparently they have to bluff their way through oral argument as though the jury didn't know anything about the evidence they just heard.

The majority faults defense counsel's argument about the security guard, but concedes that counsel pointed out the darkness that might have impaired the security officer's view, and that his three descriptions of what he saw were not the same. Since what the security guard said he saw was Gentry stabbing his girlfriend, she was in fact stabbed, and Gentry admitted stabbing her, I can't figure out what else the major-

[9]People v. Gentry, No. B094949, slip op. at 8 n.4 (Cal. Ct. App. Jan. 9, 1997).

[10]F. LEE BAILEY & HENRY B. ROTHBLATT, Successful Techniques for Criminal Trials §§ 284, 289, 317 (1971).

ity would have defense counsel do about the guard's testimony. The majority doesn't say. Defense lawyers are going to wonder whether they now have to destroy the credibility of whatever arguments they can make with a straight face by dwelling on attacks on testimony that is the admitted truth.

I doubt that counsel could have kept the jury out for six hours on this lead pipe cinch of a case had counsel not established his credibility by conceding the bad parts, and using the drug-addled condition of Gentry and his girlfriend to argue reasonable doubt. He did so in a way that didn't insult the jury's intelligence. His phrasing that the majority disapproves of, such as "I don't know what happened," obviously meant in context "you don't know what happened." This rhetoric sugar-coated the pill of suggesting that the jury didn't know what happened in so plain a case by attributing ignorance (and therefore reasonable doubt) to himself and only implying the ignorance of the jurors.

Defense counsel are now going to be concerned about making this very common sort of reasonable doubt argument. But it's often all they've got. As some public defenders like to say, "A reasonable doubt for a reasonable price." When the criminal justice system works properly (defense counsel perform the noble duty of causing it to work properly in a much higher percentage of cases), they should not be defending many innocent clients, because prosecutors ought to be filtering out of the system cases that can't be proved beyond a reasonable doubt.[11] That necessarily implies that in many cases, defense counsel doesn't have much to work with.

I am especially concerned about this case, not only because

[11]See, e.g., UNITED STATES ATTORNEYS' MANUAL 9-27.220(A), providing an internal administrative practice for United States Attorneys of declining prosecution, even where there is probable cause, unless "the admissible evidence will probably be sufficient to obtain and sustain a conviction," that is, that it will establish guilt beyond a reasonable doubt.

it flies in the face of what the Supreme Court has told us to do, but also because it has the potential to damage the quality of criminal defense in our circuit. We're de-fanging defense counsel, by limiting flexibility in closing argument, particularly by limiting the techniques counsel can use to establish personal credibility and argue reasonable doubt. The panel majority would treat Clarence Darrow's successful closing argument in the Leopold and Loeb case as deficient under Strickland, had he lost, because he conceded that his clients were bad people for whom the death penalty would be merciful: "I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind . . . I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large."[12]

This case is part of a developing body of circuit law substituting our judgment on defense tactics and presentation for the judgment of defense counsel and of state courts. Most often this occurs in death penalty cases, but the trend is seeping beyond them to more routine cases such as this one. The last thing criminal defendants and the public need is a Ninth Circuit "form book" of approved arguments and strategies, yet that's what we're giving them. We're telling them in great detail how to investigate their cases and forcing them down rabbit tracks that divert their time from better applications, that they have to produce psychiatric evidence though often it's a bad idea, that they have to make an "Officer Krupke" argument[13] even where it will produce the same mocking

[12]Clarence S. Darrow, Closing Argument for the Defense in the Leopold-Loeb Murder Trial, in FAMOUS AMERICAN JURY SPEECHES 1086 (Frederick C. Hicks ed., Legal Classics Library 1989) (1925).

[13]"Dear kindly Sergeant Krupke, / You gotta understand, / It's just our bringin' up-ke / That gets us out of hand. / Our mothers all are junkies, / Our fathers all are drunks. /Golly Moses, natcherly we're punks!

response as it did in the song.[14] Now they apparently have to make, and refrain from making, arguments according to what we held in Gentry, regardless of what they think will most likely persuade the jury to consider seriously whether there is a reasonable doubt.[15]

This growing body of law is a very bad idea. We ought to have more respect for the dedicated lawyers who defend criminal cases, and respect the judgments and instincts they apply in light of much greater knowledge of their clients and cases than we have. And we ought to have more respect for the considered judgments of our equally learned counterparts on the state courts. Our legal duty under section 2254 and the controlling Supreme Court decisions demands this deference. So does the wise and fair administration of justice.

Gee, Officer Krupke, we're very upset; / We never had the love that ev'ry child oughta get. / We ain't no delinquents, / We're misunderstood. /Deep down inside us there is good!"

STEPHEN SONDHEIM, Gee, Officer Krupke, in WEST SIDE STORY (1956), available at http://www.westsidestory.com/site/level2/lyrics/krupke.html (last visited, Jan. 9, 2003).

[14]Id ("Officer Krupke, you've done it again. / This boy don't need a job, he needs a year in the pen. / It ain't just a question of misunderstood; / Deep down inside him, he's no good!").

[15]See, e.g., Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002) (counsel interviewed his client and a witness before choosing a defense strategy but should have interviewed more witnesses); Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002) (counsel should investigate the possibility of an insanity defense even though pursuing an alibi defense); Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002) (counsel must put on evidence of an abusive childhood); Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002) (counsel should present evidence of drug use and "difficult childhood"); Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001) (counsel must investigate a theory of defense that contradicts what his client has told him); Caro v. Calderon, 165 F.3d 1223 (9th Cir. 1999) (counsel must present a brain damage from pesticides theory even if the medical experts he consults do not suggest it).

When criminal defense lawyers shape and present their cases, they ought to be thinking about the jury. They shouldn't be reading their office form book of approved and disapproved Ninth Circuit defense techniques. They should be paying full attention to the jury, not looking over their shoulders at us.

OPINION

FARRIS, Circuit Judge:

We are asked to decide whether the California Court of Appeal's decision that petitioner Lionel Gentry did not receive ineffective assistance of counsel during closing argument was an objectively unreasonable application of federal law. It was. Trial counsel's election to ignore evidence in the record that helped his client and to highlight record and non-record evidence that hurt his client cannot be defended as non-prejudicial "trial strategy." We therefore reverse his conviction with instructions to grant the writ of habeas corpus unless the State chooses to retry Gentry.

I

There is no question that on April 30, 1994, Lionel Gentry stabbed his girlfriend Tanaysha Handy. The issue was whether he did so intentionally or accidentally.

A. The Prosecution's Case

For a year and a half preceding the stabbing, Gentry and Handy lived together as boyfriend and girlfriend. At trial, Handy testified that on the fateful day she smoked crack cocaine and later went with Gentry to her aunt's apartment. Once there, she and her aunt smoked cocaine. She then departed for another apartment in the building, a "crack

house," where she smoked more cocaine and drank liquor. Later that night, Gentry came to get her, they argued, and at some point she was stabbed. Handy could not remember the details of what happened.

Faced with her inability to recall the events of April 30th, the prosecution showed Handy her preliminary hearing testimony. Although Handy recalled testifying at the preliminary hearing, she couldn't remember most of the answers reflected in the transcript, including the events surrounding the stabbing. At the preliminary hearing, Handy testified that Gentry had placed his hand around her throat and later stabbed her twice, the second stab wound landing a few inches away from the first wound. At trial, Handy testified that Gentry never grabbed her, but recalled being stabbed twice.

The surgeon who operated on Handy testified that she had suffered a one-inch stab wound laceration to the left lateral chest area. The surgeon specifically noted that Handy received a single stab wound.

The prosecution's other witness was Albert Williams, a security guard working at a neighboring building. He testified that, at about 9:45 p.m., his attention was drawn to the nearby building when he heard a man and woman arguing. Williams and his partner Pedro looked out the window of their third-floor office from where they could see Gentry and Handy as well as another man about 15 feet ahead of the couple. Although he testified at the preliminary hearing that it was "pretty dark," Williams testified at trial that it was "getting dark" and "it wasn't that dark." Upon redirect examination, he said that the area where the stabbing took place was "lighted up."

Williams testified that he saw Gentry swing his hand into Handy with an object, hitting her left side, and that she leaned forward and screamed. He saw Gentry "grab[ ] her from falling to the floor." He then witnessed Handy try to push him

away while grabbing for the unidentified object in Gentry's hand. At about this time, the second, unidentified man left Williams' field of vision.

After the stabbing, Williams and his partner Pedro left the third-floor landing of their building, went down two flights of stairs to the first floor, and jumped a six-foot-high gate to assist Handy. He found the couple struggling over the knife. Williams heard Gentry and Handy saying things to one another but could not remember what they said. Williams and his partner Pedro intervened and subdued Gentry. Gentry never tried to run away and never punched at Williams or Pedro. Instead, Gentry kept trying to get back to Handy, saying, "she's my girlfriend."

B. The Defense Case

The defense case consisted entirely of Gentry's testimony. According to Gentry, at about 10 p.m., he went looking for Handy within her aunt's building. He found her getting high in a first-floor apartment "crack house." To get to that apartment, Gentry had to pass through a gate, but because he did not have a key, he used a knife from the aunt's apartment to open the lock. When he entered the apartment, Handy was in a back room with another man. Gentry and Handy began arguing and left the apartment, to be followed by a dope dealer. As they were walking down the alleyway between buildings, Gentry and the other man, the dope dealer, got into a physical altercation. Handy tried to intervene several times by grabbing Gentry; he repeatedly pushed her away. At some point, Gentry threatened the dope dealer with the knife and when Handy tried to intervene again, he pushed her away with his right hand, which carried the knife, and accidentally stabbed her. The dope dealer then ran off.

At first, Gentry neither realized nor believed that he had stabbed Handy, but once he figured out what had happened, he tried to help her. Williams and his partner then arrived on

the scene and told him to back away from Handy. Gentry refused, repeatedly saying "that's my woman," until finally he was handcuffed by Williams and Pedro. Gentry testified that he never intended to stab Handy.

After Gentry testified about the stabbing, defense counsel asked about Gentry's prior convictions. Gentry testified that he had been convicted only once, though he had clearly been convicted previously of burglary, grand theft, battery on a police officer, and being a felon in possession of a firearm. On direct examination, he expressed confusion over whether the term "conviction" covered "plea bargains." On cross-examination, he was impeached by the prosecution's serial recitation of his prior convictions, all of which he acknowledged in open court while still expressing confusion over whether "conviction" covered cases for which he pleaded guilty and did not receive jail time.

C. Closing Arguments

In her closing argument, the prosecutor zealously advocated for a guilty verdict. She expressed sympathy for Handy and her unfortunate circumstances—the fact that Handy was a pregnant drug-addict with three children—and argued that Handy's preliminary hearing testimony should be believed despite her protestations at trial that she could not remember what had happened. The prosecutor then argued that Gentry's testimony was "a pack of lies," and that the testimony of eyewitness Williams, who had no reason to lie, contradicted Gentry's version of the events.

In contrast, defense counsel's summation to the jury was casual and perfunctory. The argument in its entirety was as follows:

> I don't have a lot to say today. Just once I'd like to find a prosecutor that doesn't know exactly what happened. Just once I'd like to find a D.A. that

wasn't there and that can tell and they can stand up here and be honest and say I don't know who is lying and who is not 'cause she wasn't there, ladies and gentlemen. [I] wasn't there. None of the 12 of you were there. None of the other people in this courtroom were there except those two people and that one guy who saw parts of it, or saw it all. Pretty dark. Dark. It was light.

Those are the three versions of his testimony with regard to what he saw and what he saw. I don't know what happened. I can't tell you. And if I sit here and try to tell you what happened, I'm lying to you. I don't know. I wasn't there. I don't have to judge. I don't have to decide. You heard the testimony come from the truth chair. You heard people testify. You heard good things that made you feel good. You heard bad things that made you feel bad.

I don't care that Tanaysha is pregnant. I don't care that she has three children. I don't know why that had to be brought out in closing. What does that have to do with this case? She was stabbed.

The question is, did he intend to stab her? He said he did it by accident. If he's lying and you think he's lying then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994.

He doesn't know whether or not he's been convicted. Didn't understand the term conviction. That is not inconsistent with this whole thing of being spoken and doing all this other crime stuff as

opposed to going to school. I don't know. I can't judge the man. The reason that they bring 12 jurors from all different walks of life, let them sit here and listen to people testify, and the reason that the court will give you instructions with regard to not having your life experience, leaving it at the door, is because you can't just assume that because a guy has done a bunch of bad things that he's now done this thing.

I don't know if thievery and stabbing your girlfriend are all in the same pot. I don't know if just because of the fact that you stole some things in the past that means you must have stabbed your girlfriend. That sounds like a jump to me, but that's just [me]. I'm not one of the 12 over there.

All I ask you to do is to look at the evidence and listen to everything you've heard and then make a decision. Good decision or bad decision, it's still a decision. I would like all 12 of you to agree; but if you don't, I can't do anything about that either.

You heard everything just like all of us have heard it. I don't know who's lying. I don't know if anybody is lying. And for someone to stand here and tell you that they think someone is lying and that they know that lying goes on, ladies and gentlemen, if that person was on the witness stand I'd be objecting that they don't have foundation because they weren't there. And that's true. The defense attorney and the prosecutor, no different than 12 of you.

So I'd ask you to listen to what you've heard when you go back, ask you to take some time to think about it, and be sure that's what you want to do, then come out and do it.

Thank you.

In her rebuttal argument, the prosecutor capitalized on the weakness of defense counsel's summation. She pointed out that, despite defense counsel's suggestion to the contrary, the jury could and should decide who was lying and who was telling the truth, as is consistent with the concept of a trial by jury. She then repeated that Williams' testimony was believable, dispositive, and clearly contradicted Gentry's testimony.

The jury deliberated for about six hours before finding Gentry guilty of assault with a deadly weapon in violation of California Penal Code §§ 254(A)(1) and 12022.7(a). Due to his prior convictions, Gentry was sentenced to 39 years to life. On direct appeal, Gentry argued that his attorney had rendered ineffective assistance by, in closing argument, failing to present a defense and making disparaging remarks about Gentry. The California Court of Appeal affirmed his conviction and sentence, and the California Supreme Court denied his petition for review.

Gentry then petitioned for a writ of habeas corpus in the district court. The magistrate judge issued a report and recommendation recommending dismissal of the petition with prejudice. The district court adopted the R&R and dismissed the petition. Gentry then appealed.

We granted a Certificate of Appealability limited to the issue of whether defense counsel's summation violated Gentry's Sixth Amendment right to effective assistance of counsel.

II

[1] We review de novo the district court's denial of Gentry's 28 U.S.C. § 2254 habeas petition. See Shackleford v. Hubbard, 234 F.3d 1072, 1077 (9th Cir. 2000). A federal court may grant a writ of habeas to a state prisoner only if the

state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or were "based on an unreasonable determination of the facts in light of the evidence presented in the state courts." 28 U.S.C. § 2254(d). "[I]t is not enough that the defendant convinces the federal court that, in its independent judgment, the state-court decision" applied the law incorrectly. Bell v. Cone, 122 S. Ct. 1843, 1852 (2002). Rather, to warrant habeas relief, the defendant must show that the state court applied federal law to the facts of his case in an "objectively unreasonable manner." Id.

The California Court of Appeal deemed trial counsel's closing argument to be an exercise of sound trial strategy that did not prejudice the outcome. We find that conclusion to be not only incorrect, but also to be an objectively unreasonable application of federal law.

III

Before reaching the merits, we ask the threshold question of whether the nonretroactivity principle of Teague v. Lane, 489 U.S. 288 (1989), prevents us from granting habeas corpus relief based on a new constitutional rule announced after Gentry's conviction and sentence became final. See Horn v. Banks, 122 S. Ct. 2147, 2150 (2002); Caspari v. Bohlen, 510 U.S. 383, 389 (1994). We find that a state court considering Gentry's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks to apply here—the Sixth Amendment right to effective assistance of counsel—was required by the Constitution. See Caspari, 510 U.S. at 390 (1994). Indeed, the California Court of Appeal explicitly examined this claim.

[2] To prevail on a claim of ineffective assistance of counsel, Gentry must show both that counsel's performance was deficient, and that the deficient performance prejudiced the

defense.[1] See Strickland v. Washington, 466 U.S. 668, 687 (1984); Visciotti v. Woodford, 288 F.3d 1097, 1105 (9th Cir. 2002). When considering whether counsel's performance was deficient, we are highly deferential to counsel's performance, indulging a presumption that "under the circumstances, the challenged action might be considered sound trial strategy." Bell, 122 S. Ct. at 1852 (internal quotations omitted). To show prejudice, Gentry must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694).

A. Deficient Performance

Gentry "must show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The California Court of Appeal determined that the performance of Gentry's counsel was not deficient, reasoning that he "addressed pertinent issues of the case, including the reliability of Williams's testimony, whether [Gentry] intended to stab Ha[n]dy, and the significance of the prior impeachment evidence." That conclusion is objectively unreasonable.

[3] What is most striking about trial counsel's closing argument is that he mentioned a host of details that hurt his client's position, none of which mattered as a matter of law, while at the same time failing to mention those things that did matter, all of which would have helped his client's position. Instead of asking the jury to acquit his client, he made only a passive request for it to reach some verdict. Although he told the jury that the case hinged on Gentry's credibility, trial

[1]At oral argument, Gentry conceded that the Supreme Court's recent decision in Bell v. Cone, 122 S. Ct. 1843 (2002), made it clear that Strickland's requirement that a defendant show both a deficiency and prejudice applies to the circumstances presented here. We therefore do not address his abandoned argument that prejudice should be presumed in accordance with United States v. Cronic, 466 U.S. 648 (1984).

counsel's assertions that he did not know "what happened" or "who is lying" implied that even he did not believe Gentry's testimony. He referred to Gentry as a "bad person, lousy drug addict, stinking thief, jail bird." He didn't discuss Handy's unreliable testimony, the relevance of Williams' inability to see the stabbing clearly on the issue of intent, the consistencies between Williams' and Gentry's testimony, the government's failure to produce Williams' partner "Pedro" who was purportedly a disinterested witness, and the fact that a one-inch deep wound inflicted by a six-inch knife would be consistent with an accidental stabbing if Handy was flimsily clad. Beyond the meek, personal statement "I don't know what happened," trial counsel did not even argue that the government had failed to meet its burden of proving beyond a reasonable doubt that Gentry intended to stab Handy.

The prosecution's case hinged on (1) the jury believing Handy's preliminary hearing testimony and disbelieving her trial testimony, and (2) the jury accepting that Williams' testimony contradicted Gentry's testimony and indicated Gentry's intent to stab Handy. Defense counsel never discussed Handy's testimony, instead choosing to react to the prosecutor's expression of sympathy to the victim by noting, "I don't care that Tanaysha is pregnant. I don't care that she has three children. . . . What does that have to do with this case?" His sole reference to Williams' testimony was "Pretty dark. Dark. It was light. Those are the three versions of his testimony with regard to what he saw and what he saw."

Trifling comments about inconsequential aspects of the case cannot be excused as trial strategy. At trial, Handy testified that at the time of her stabbing, she had been using crack cocaine "24 hours a day" for more than five years. She had also smoked "a lot" of crack in the early morning hours on the day of the preliminary hearing and was feeling its effects when she testified. She acknowledged that when she is high, she sees "weird things," including ghosts. She testified at trial and at the preliminary hearing that she was stabbed twice

when there is no question she was stabbed only once. In closing argument, defense counsel mentioned none of this.

Williams' testimony is not inconsistent with an accidental stabbing. From the third floor of a neighboring building, Williams witnessed Gentry strike Handy with an object later found to be a knife. Williams testified that after he ran downstairs and hopped over a fence, all three of them struggled over the knife, but when the knife fell to the ground, Gentry didn't try to retrieve it, he kept moving toward Handy while saying again and again, "she's my girlfriend." Williams' testimony about the lighting is important, but only to the extent to which it casts doubt on the conclusion that Gentry stabbed Handy intentionally. Trial counsel's only comment on any part of Williams' testimony was "[t]hose are the three versions of his testimony with regard to what he saw and what he saw." Such statements qualify, at best, as passive recitations of facts, not as argumentation.

Gentry's version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was at times agitated, confused, and evasive. He demonstrated the stabbing by inappropriately touching the prosecutor. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of Gentry's testimony may, in fact, be true, even in light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing his client during closing argument. See, e.g., United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) (finding defense counsel's representation to be deficient where he conceded in closing argument that no reasonable doubt existed and proceeded to discuss the importance of the judicial system).

[4] Closing argument is not simply a pro forma aspect of the criminal case, but an essential one:

> [C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact there may be reasonable doubt of the defendant's guilt . . . .
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> . . . . In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Herring v. New York, 422 U.S. 853, 862 (1975). The perfunctory and ineffectual closing argument by Gentry's trial counsel constituted deficient representation. The California Court of Appeal's decision to the contrary was unreasonable.

B. Prejudicial Effect

[5] To demonstrate prejudice, Gentry bears the burden of showing a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 688. "A 'reasonable probability' is less than a preponderance: [t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Visciotti, 288 F.3d at 1108 (quoting Strickland, 466 U.S. at 694).

[6] The California Court of Appeal found there to be "overwhelming evidence of [Gentry's] guilt." We disagree. The

sole question is one of intent. The most damning evidence of intent was Handy's preliminary hearing testimony that Gentry grabbed her throat before stabbing her twice, testimony given under the influence of crack cocaine, later disavowed, and shown to be inconsistent with the physical evidence of a single stab wound. The other circumstantial evidence was Williams' testimony that Gentry and Handy struggled over a knife, an object that was later dropped and ignored in Gentry's attempt to get closer to his girlfriend.

[7] The jury was presented with an ineffectual closing argument by defense counsel that failed to address the only aspects of the case that mattered. Nevertheless, the jury deliberated for six hours before returning a verdict. We find there to be a reasonable probability that the result of the trial would have been different in the absence of trial counsel's deficient performance during closing argument. The California Court of Appeal's decision to the contrary was unreasonable.[2]

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[2]My brother in dissent focuses so strongly on the language of the holding in Bell v. Cone, 122 S.Ct. 1843 (2002) that he overlooks its rationale. Bell concerned a defense attorney's failure to give a closing argument in the penalty phase of a capital trial. The Supreme Court rejected the defendant's claim that this constituted presumptively prejudicial ineffective assistance of counsel under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Instead, it held that the attorney's waiver of summation had to be evaluated under the standard two-prong Strickland test. Bell, 122 S.Ct. at 1850-52.

When the Supreme Court applied Strickland to the particular facts in Bell, it noted that the defense presented considerable mitigating evidence to the jury during the guilt phase. Defense counsel highlighted this evidence in his opening statement to the jury at the penalty phase. Afterwards, the prosecution failed to put on any particularly dramatic or impressive aggravating evidence. Then, when the junior prosecutor delivered a "low-key" closing that did not dwell on any of the horribly brutal aspects of the defendant's senseless murder of two elderly people in their home, defense counsel faced a strategic choice: he could present a closing that would repeat for the jury the mitigating evidence already discussed in his opening statement, but that would give the lead prosecutor (who all agreed was "very persuasive") the chance to present a compelling rebuttal

IV

[8] Trial counsel's rambling, perfunctory closing argument violated petitioner Lionel Gentry's Sixth Amendment right to effective assistance of counsel. The California Court of Appeal's decision to the contrary was an objectively unreasonable application of federal law. We reverse the district court's denial of a writ of habeas corpus, vacate Gentry's conviction, and remand to the district court with instructions to grant the petition for a writ of habeas corpus unless the State within a reasonable period grants a new trial.

REVERSED AND REMANDED WITH INSTRUCTIONS.

SILVERMAN, Circuit Judge, dissenting:

The sole question before us is whether the California Court of Appeal's decision was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. Despite this, my colleagues in the majority say virtually nothing about the decision or reasoning of the California Court of Appeal. Rather, they analyze this case as if they were reviewing a direct appeal of a federal criminal trial, instead of the denial of habeas relief to a state prisoner under § 2254.

It makes a big difference. Federal habeas relief is not available simply because a federal court concludes "that the rele-

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argument to the jury portraying the defendant as a heartless killer; or he could prevent the lead prosecutor from giving such an argument by waiving his own summation and relying on the jury's recollection of the opening defense statement he made just a few hours earlier. The Supreme Court held that neither option so clearly outweighed the other that it was objectively unreasonable for the state court to categorize counsel's choice to waive argument as a valid tactical decision. Bell, 122 S.Ct. at 1852-54.

vant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams v. Taylor, 529 U.S. 362, 411 (2000).

The California Court of Appeal examined defense counsel's closing argument. It pointed out that counsel "argued that he had never found a prosecutor who did not claim to know what had happened in a case, but urged the prosecutor was not present at the incident." The court noted that counsel "commented on Williams's various versions of his testimony" and that counsel "urged that the question was whether appellant intended to stab Handy." The California Court of Appeal noted that counsel argued that the jury must not assume that his client was guilty just because he had a prior record. It then said:

> It is settled that "[t]he effectiveness of an advocate's oral presentation is difficult to judge from a written transcript, and the length of an argument is not a sound measure of its quality." (People v. Cudjo, (1993) 6 Cal.4th 585, 634-635.) We have noted above portions of appellant's counsel's argument which addressed pertinent issues of appellant's case, including the reliability of Williams's testimony, whether appellant intended to stab [Handy], and the significance of the prior conviction impeachment evidence. Based on that, the entirety of counsel's argument, and the overwhelming evidence of guilt, we conclude appellant was not denied his constitutional right to effective assistance of counsel. [Citations omitted.] None of the cases cited by appellant compels a contrary conclusion. [Footnote 5:] This includes U.S. v. Cronic (1984) 466 U.S. 648 . . . since, based on the above, counsel did not "entirely fail[ ]" to subject the prosecution's case to meaningful adversarial test.

Judges might agree or disagree with that analysis, but it is difficult to see how it can be said to be unreasonable, especially in light of Bell v. Cone, 122 S. Ct. 1843 (2002). In Bell, a death penalty case, defense counsel made no closing argument whatsoever. In upholding the denial of habeas relief, the Court said:

> For respondent to succeed, however, he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. Rather, he must show that the Tennessee Court of Appeals applied Strickland to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do.
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> * * *
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> Respondent also focuses on counsel's decision to waive final argument. He points out that counsel could have explained the significance of his Bronze Star decoration and argues that his counsel's failure to advocate for life in closing necessarily left the jury with the impression that he deserved to die. The Court of Appeals "rejected out of hand" the idea that waiving summation could ever be considered sound trial strategy. 243 F.3d, at 979. In this case, we think at the very least that the state court's contrary assessment was not "unreasonable."

122 S. Ct. at 1852, 1853-54 (citations omitted).

The Court also took the opportunity to reiterate the caution it issued in Strickland. Said the Bell Court:

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of rea-

> sonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.

Id. at 1854.

After Bell, there is simply no way that the California Court of Appeal decision can be characterized as so off-the-wall as to be unreasonable. To reiterate, the Court of Appeal correctly noted that counsel had identified the sole issue (was the stabbing an accident?), linked his client's testimony to that issue, pointed out inconsistencies in the prosecution witnesses' testimony, and attempted to deal with the very unfavorable fact that his client's testimony had been severely impeached with several prior felony convictions, some of which he initially denied.

My colleagues in the majority have pointed out various things that counsel could have argued but didn't, and things that counsel did in fact say that could have been said better. The same can be said of any closing argument. The majority points out that counsel didn't argue that the stab wound to the chest was "only" one-inch deep. That fact is not nearly as significant as the majority seems to think. What matters is that petitioner did not inflict a superficial scratch. To the contrary, the evidence showed that the stab wound Handy received occasioned a great loss of blood and required two-hours of emergency surgery by a vascular surgeon. Counsel's decision not to draw the jury's attention to the magnitude of the victim's wound is entitled to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Bell, 122 S. Ct. at 1854.

What particularly sticks in the majority's craw is that in attempting to deal with the evidence of his client's bad prior record, defense counsel argued: "If you don't think he's lying — bad person, lousy drug addict, stinking thief, jail bird, all

that to the contrary — he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994."

As Magistrate Judge Arthur Nakazato pointed out in his thorough Report and Recommendation, which was adopted by Judge Rafeedie, "The disparaging statements concerning petitioner . . . and references to his criminal convictions were part of defense counsel's strategy to establish some degree of credibility with the jury by conceding his past acts, while simultaneously emphasizing that his bad character was irrelevant to the issue before the jury."

Ironically, the majority resorts to the same sort of rhetorical device when its says:

> [Petitioner's] version of the events is not, of course, the only one worthy of credence. Far from it. The record shows that at trial he was agitated, confused, and evasive. He may have deliberately lied about his past convictions, though it is impossible to discern why he would do so, especially when the first questions about them were posed by his counsel. Little of [petitioner's] testimony may, in fact be true, even in the light of the evidence suggesting the possible defense of accident. But none of this alters trial counsel's duty to meet an objective standard of reasonableness in representing his client during closing argument.

Opinion at 1272.

Perhaps other lawyers would have handled the knotty problem of petitioner's lengthy rap sheet differently — or, indeed, the entire argument differently. No matter. The only thing that does matter is whether the California Court of Appeal was unreasonable — not just wrong, but unreasonable — in ruling

that petitioner was not denied effective assistance of counsel. Since counsel's closing argument was no worse than no-closing-argument-at-all, as occurred in the Supreme Court case of Bell v. Cone, it follows that the California Court of Appeal cannot be said to have unreasonably applied federal law as determined by the Supreme Court. Therefore, I respectfully dissent.